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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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vol. 10
no. 18

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FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
Susan Ness
Rachelle B. Chong

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-234

In the Matter of

Amendment of Section 73.606(b), RM-8289
Table of Allotments,
TV Broadcast Stations
(Boca Raton and Lake Worth, Florida)

REPORT AND ORDER

Adopted: August 10, 1995; Released: August 21, 1995

By the Chief, Allocations Branch:

1. On August 26, 1993, the Allocations Branch issued a *Notice of Proposed Rule Making* proposing to permit two parties in Florida to trade channels and communities of license.[1] The proposed swap involved Palmetto Broadcasters Associated for Communities, Inc., permittee of noncommercial television station WPPB-TV, Channel *63, Boca Raton, Hispanic Broadcasting, Inc., permittee of commercial television station WHBI-TV, Channel 67, Lake Worth, and Fouce Amusement Enterprises, Inc. This would have resulted in the operation of WPPB-TV by Palmetto on Channel *67 in Lake Worth and WHBI-TV by Fouce on Channel 63 in Boca Raton. The proposed channel swap was requested pursuant to Section 1.420(h) of the Commission's Rules, 47 C.F.R. § 1.420(h), and the proposed change in the respective communities of license was requested pursuant to Section 1.420(i) of the Commission's Rules, 47 C.F.R. § 1.420(i).

2. In its comments filed in response to the *Notice*, Hispanic Broadcasting now opposes the proposed exchange and change of community of license. As a consequence, there is no basis to consider this matter further.

3. Accordingly, IT IS ORDERED that the aforementioned proposals ARE DISMISSED.

4. IT IS FURTHER ORDERED that MM Docket No. 93-234 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] *Notice of Proposed Rule Making* in MM Docket No. 93-234, 8 FCC Rcd 6189 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-44

In the Matter of

Amendment of Section 73.202(b), RM-8602
Table of Allotments,
FM Broadcast Stations.
(Fair Bluff, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 11, 1995; Released: August 21, 1995

By the Chief, Policy & Rules Division:

1. At the request of Atlantic Broadcasting Co., Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 4018 (1995), alternatively proposing the deletion of vacant and unapplied-for Channel 287A at Fair Bluff, North Carolina, or the retention of the channel with a 12.7 kilometer (7.9 mile) northeast site restriction. Comments were filed by the petitioner, reiterating its desire to have Channel 287A deleted from Fair Bluff, and by S.O.S. Broadcasting ("SOS"), Jack Miller ("Miller") and Robert Gauss ("Gauss"), each expressing an intention to apply for Channel 287A at Fair Bluff. Reply comments were filed by the petitioner.

2. Petitioner, licensee of Station WDAR-FM, Channel 288C3, Darlington, South Carolina, currently operates with a directional antenna to protect the Fair Bluff allotment. It requested the deletion or site restriction of Channel 287A at Fair Bluff to accommodate Station WDAR-FM's pending application specifying non-directional operation (BMPH-950224ID). Miller, in stating his intention to apply for the channel, stated that he had no objection to the imposition of the proposed site restriction while Gauss was silent on the issue. SOS, however, objects to the site restriction, stating that the site restriction could "seriously" impair the viability of the station because of the "limited" principal community contour coverage capability of Class A stations. In addition, it believes the site restriction may make it extremely difficult, if not impossible, to locate an acceptable transmitter site given current local regulatory difficulties in establishing transmitter sites. SOS submits that the Commission prefers the establishment of new broadcast service over the enhancement of existing services, citing *Andalusia, Alabama*, 49 FR 32201 (1984). Because the petitioner has not shown that the imposition of the site restriction is the only way in which the station can achieve omnidirectional operation or that Station WDAR-FM's current coverage is inadequate, it urges the retention of Channel 287A at Fair Bluff without the proposed site restriction.

3. In response, petitioner states that the public interest would be served by imposing the proposed site restriction on Channel 287A at Fair Bluff because Station WDAR-FM will be able to provide service to an additional 3,800 people, while also permitting Fair Bluff to retain the FM channel. Petitioner states that SOS is the only party to object to the imposition of the site restriction, pointing out that neither Miller nor Gauss objected to the imposition of the proposed site restriction, with Miller affirmatively stating that it had no objection. It states that the reasons for SOS's objections, that the site restriction could make it difficult to provide Fair Bluff with the required city-grade signal and that general regulatory difficulties may make it difficult to locate an acceptable transmitter site, are wrong. Petitioner states that it has not only located a proposed transmitter site (at coordinates 34-21-08 North Latitude; 78-54-07 West Longitude) only 0.86 kilometers from the suggested reference coordinates from which a station could provide Fair Bluff with the required 70 dBu city-grade signal but also obtained permission to construct a transmitter. In addition, petitioner submits that it has contacted officials with the Columbus County building permit office who stated that they did not see any reason why a building permit would not be issued for the proposed facility and foresaw no local zoning problems. Finally, petitioner states that its technical consultant believes a proposed 105 meter tower would have no detrimental aeronautical effect since the site is approximately 20 kilometers from the nearest airport and thus FAA approval would be given.

DISCUSSION

4. We believe the public interest would be served by retaining Channel 287A at Fair Bluff since interests have been expressed in activating the channel, thus providing the community with its first local FM service. Moreover, we will not impose the site restriction requested by the petitioner. It has been our general policy not to change reference coordinates for vacant allotments in the course of a rule making proceeding in the absence of other changes in the Table of Allotments or to entertain rule making petitions solely to change reference coordinates. *See, e.g., Chatom, AL*, DA 95-1548, released July 18, 1995; *Grenada, MS*, 7 FCC Rcd 4838 (1992). The reason for this policy is to protect the integrity of the FM Table of Allotments, which would be comprised were we to change reference coordinates to accommodate FM applications. For example, as prospective applicants for a vacant FM channel may be in the process of obtaining specific site locations, a change in the reference coordinates of a vacant allotment could alter significantly the area of site availability.

5. Further, it is well established Commission policy to allot channels with the least site restriction possible. This provides prospective applicants with the greatest flexibility in selecting transmitter sites, thus aiding in the activation of new stations. *See Vacaville, CA*, 4 FCC Rcd 8315 (1989), *recon. den.*, 6 FCC Rcd 143 (1991). As presently allotted, Channel 287A requires a site restriction of 6.5 kilometers (4.1 miles) northwest. We do not believe that the benefits accruing from enabling Station WDAR-FM to operate omnidirectionally are sufficiently compelling to justify imposing such a substantially greater site restriction (12.7 kilometers (7.9 miles) northeast) than already necessary. According to the petitioner, omnidirectional operation will enable Station WDAR-FM to provide service to an additional 3,800 people. However, it provides no showing demonstrating that the residents within the new service area are currently unserved or underserved or that the site specified in its outstanding construction permit is the only transmit-

ter site available. Moreover, it would be premature to determine that the ultimate Fair Bluff licensee will not specify a transmitter site which can co-exist with an omnidirectional Station WDAR-FM, and petitioner has demonstrated that at least one such site exists.

6. Accordingly, IT IS ORDERED, That the petition of Atlantic Broadcasting Company, Inc. (RM-8602) IS DENIED.

7. The window period for filing applications for Channel 287A at Fair Bluff, North Carolina, will open on **October 5, 1995**, and close on **November 6, 1995**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-647

In the Matter of

Amendment of Section 73.202(b), RM-7180
Table of Allotments,
FM Broadcast Stations.
(Hallie and Ladysmith,
Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 11, 1995; Released: August 21, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 111 (1991), issued in response to a petition for rule making filed by Stewards of Sound, Inc. ("Stewards"), licensee of Station WWIB, Channel 279C1, Ladysmith, Wisconsin. The *Notice* proposed the reallotment of Channel 279C1 from Ladysmith to Hallie, Wisconsin, and modification of the license for Station WWIB accordingly. Stewards filed comments reiterating its intention to apply for Channel 279C1, if allotted to Hallie. No other comments were received at the Commission.

2. In the *Notice*, we stated that we were unable to determine if the reallotment of Channel 279C1 from Ladysmith to Hallie would result in a preferential arrangement of allotments. We noted that Hallie is partially within the Eau Claire, Wisconsin, Urbanized Area as defined by the U. S. Census, and questioned whether Hallie should be credited with all of the services licensed to the Urbanized Area or whether the reallotment would provide Hallie with its first local FM broadcast service. Stewards does not propose to relocate its transmitter or upgrade its facilities. Station WWIB currently provides Hallie with a 70 dBu signal from the licensed site. Therefore, the reallotment would not provide any first or second full-time aural service and there would be no loss or gain of reception service to either community or the surrounding area. Since Hallie (population 4,531 persons according to the 1990 Census)[1] already receives local aural transmission service from one station, the proposal would not result in the provision of a first local aural transmission service.[2] Stewards notes that Ladysmith receives local transmission service from three stations.[3]

3. Stewards submitted information to support its claim that Hallie is an independent community deserving of a first local FM service. According to Stewards, Hallie has more need than Ladysmith with regard to local transmission service as Ladysmith currently has three stations while only one AM station is licensed to Hallie. Therefore, adoption of the proposal will equalize the communities at two stations each. Stewards states that although it does not qualify for the highest priority, first reception service, there will be no loss of service since it does not intend to relocate the transmitter. Stewards contends that Hallie is an independent community from Eau Claire with its own local government, Police Department and fire chief, utility services, schools, churches and social organizations and a full-time ambulance service. According to Stewards, there are 1,258 residential homes and 124 businesses in Hallie and that some residents work outside Hallie and residents of other communities commute to Hallie to work. Stewards argues that the Town of Hallie is a separate and independent community from Eau Claire and should not be credited with all of the aural services licensed to the Eau Claire Urbanized Area.

4. Stewards requested action on its petition in accordance with Section 1.420(i) of the Rules which allows a change in community of license without facing competing expressions of interest. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), *recon. granted in part* ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). As indicated in the *Notice*, Hallie is partially within the Eau Claire, Wisconsin, Urbanized Area. Although this is not a request for a first local service preference, because Hallie is located partially within an urbanized area, we shall use the criteria established in *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951), *RKO General, Inc.* ("KFRC"), 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck* ("Tuck"), 3 FCC Rcd 5374 (1988) as a guideline in this proceeding to determine whether to attribute the Eau Claire transmission services to Hallie. Under these cases, three criteria are considered--signal population coverage, the size of the suburban community relative to the adjacent city, and the interdependence of the suburban community with the central city.[4]

5. With respect to "signal population coverage," Station WWIB currently provides a 70 dBu signal over Eau Claire, Hallie and Ladysmith. Since Stewards indicates that it does not intend to move its transmitter, there will be no change

[1] The 1980 Census credited Hallie with a population of 4,275. Both the 1980 and 1990 Census indicate Hallie is partially within the Eau Claire Urbanized Area.

[2] Station WOGO(AM) is licensed to Hallie.

[3] Stations WLDY(AM), WLDY-FM and WWIB are licensed to Ladysmith.

[4] There are eight factors relevant to interdependence: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the municipal services such as police, fire protection, schools, libraries. *See KFRC supra*.

in coverage. As for size and proximity, Hallie has a 1990 census population of 4,531 people of which 2,338 are located within the Eau Claire Urbanized Area. The community of Hallie is located approximately six miles from Eau Claire. Eau Claire has a population of 56,856 people.

6. With respect to the third factor, interdependence, we conclude that Hallie is sufficiently independent from Eau Claire to warrant a second local service. Stewards has shown that the residents of Hallie consider the town to be independent from Eau Claire and take pride in their independence. Hallie has its own local government and elected officials consisting of a five-person Board of Supervisors with a full-time secretarial staff. The Hallie Police Department has five full-time officers and several reserve officers. Hallie has a full-time Fire Chief and participates in the wider area fire protection district. Hallie has a Land Use Planning and Zoning Office in the Chippewa County Zoning Office and is a member of the Regional Planning district. Hallie is provided utility services by Sanitary District No. 1, Town of Hallie, as well as full-time ambulance service. The residents of Hallie are members of the Chippewa Falls School District which operates two schools in Hallie. There are also two Christian schools in the community. Hallie is home to nine churches and there are nineteen social and service organizations that serve the residents of the community. Hallie also has an extensive park system and recreational facilities to serve its residents. Stewards provided statistics indicating there are approximately 1,258 residential homes and 124 businesses in the community of Hallie. Stewards did not provide exact figures but states that Hallie residents work outside of Hallie as well as in the community while residents of other surrounding communities commute to Hallie to work.

7. We conclude that Hallie, partially located within the Eau Claire Urbanized Area, should be treated as a separate and distinct community. While factors one and two would appear to favor attributing the Eau Claire stations to Hallie, the third factor, interdependence of the suburban community to the urbanized area, strongly favors a finding of not attributing the Eau Claire stations to Hallie. As stated in *Tuck*, the size and proximity of the specified community to the central city and signal population coverage are pertinent, but less significant than evidence of independence. As a result, we will not attribute the Eau Claire stations to Hallie.

8. Having made that decision, we must next determine whether Steward's proposal would result in a preferential arrangement of allotments. To do so, we must compare the existing and proposed arrangement of allotments using the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.[5] Our decision is based on Priority No. 4, other public interest matters. Under this priority, the proposed arrangement of allotments would result in the addition of a first local FM station and first competitive local aural service to Hallie, population 4,531. By way of contrast, retaining the existing arrangement of allotments would result in Ladysmith, population 3,938, having three local transmission services. Since Hallie has a larger population, we believe that the public interest is better served by providing a second local transmission service to Hallie rather than having three such services in Ladysmith. Our view is further buttressed by the fact that there will be no disruption in reception service to residents of Ladysmith because Stewards is not moving its transmitter. Ladysmith will continue to receive local service from Stations WLDY(AM) and WLDY-FM while Hallie will get local service from Stations WOGO(AM) and WWIB. Based on the information before us, we find that the public interest would be served by reallotting Channel 279C1 from Ladysmith, Wisconsin, to Hallie, Wisconsin.

9. Channel 279C1 can be allotted to Hallie, Wisconsin, in compliance with the Commission's minimum distance requirements at the licensed site of Station WWIB.[6] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station WWIB to specify Hallie, Wisconsin, as its community of license on Channel 279C1 in lieu of its use at Ladysmith, Wisconsin.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 5, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Hallie, Wisconsin	279C1
Ladysmith, Wisconsin	224A

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WWIB, Ladysmith, Wisconsin, IS MODIFIED, to specify operation at Hallie, Wisconsin, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-5807 except for the community as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-5807, except for the community as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Stewards of Sound,

[5] (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight would be given to priorities (2) and (3)].

[6] The coordinates for Channel 279C1 at Hallie are 45-06-35 and 91-09-43.

Inc, licensee of Station WWIB, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER CABLE
d/b/a CABLEVISION OF
ORANGE

Motion to Dismiss
Appeal of Local
Rate Order of City of
Orange, California

Meredith J. Jones
Chief, Cable Services Bureau

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1995; Released: August 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 12, 1995, Time Warner Cable, d/b/a Cablevision of Orange ("Time Warner") filed with the Commission an appeal of a local rate order adopted on December 13, 1994 by its franchising authority, the City of Orange, California ("the City"). On February 1, 1995, the City filed an opposition to which Time Warner filed a reply. In its rate order, the City established Time Warner's rates for basic tier service and associated equipment and required Time Warner to refund overcharges to subscribers.[1]

2. On July 20, 1995, Time Warner filed with the Commission a motion to dismiss its earlier-filed appeal. In its motion, Time Warner states that all outstanding differences with the City have been resolved and requests that the Commission dismiss its appeal. While the City has filed no formal response, it has indicated orally that it does not oppose the motion.[2] Therefore, Time Warner's motion to dismiss is granted.

II. ORDERING CLAUSE

3. Accordingly, IT IS ORDERED THAT Time Warner's motion to dismiss its appeal of the local rate order issued by the City of Orange, California IS GRANTED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[2] During the week of June 26, 1995, Commission staff was advised by David De Berry, Assistant City Attorney for the City of Orange, that, as far as the City was concerned, all of the issues raised in Time Warner's appeal had been settled by the parties and no longer required resolution by the Commission. a

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Relief of

OREGON COAST MAGAZINE,
Petitioner,

vs. CSR 4340-L

TCI CABLEVISION OF OREGON, INC.,
Respondent,

For Leased Access Channels

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1995; Released: August 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 21, 1994, Oregon Coast Magazine (herein "OCM") filed a letter with the Federal Communications Commission. The letter states, in its entirety that

> "Oregon Coast Magazine has produced half-hour, general entertainment shows for distribution on cable systems. We are aggrieved by the refusal of TCI Cablevision to make commercial channel capacity available in accordance with the Cable Television Consumer Protection and Competition Act of 1992 and your implementing regulations.
>
> "Specifically, TCI has not made available its current schedule of commercial leased access rates on the Newport OR system, despite the fact that such a schedule was published previously by them. A copy is attached. Its regional office in Corvallis OR has not responded to our request to discuss any technical concerns. The actions violate FCC regulations 76.970 (e) and 76.971(c).
>
> "I certify that a copy of this petition has been served on the TCI regional office in Corvallis OR and to the offices of the system in Newport."[1]

2. On March 3, 1995, TCI Cablevision of Oregon, Inc. (herein "TCI") filed a response,[2] in which it asserts that OCM "does not allege that TCI of Oregon has failed to make commercial channel capacity available and does not challenge the reasonableness of TCI of Oregon's rates for such capacity."[3] TCI asserts further that the OCM letter is based solely on the allegation that TCI "has not made available its current schedule of commercial leased access rates" on TCI's Newport, Oregon cable system,[4] and that at the time the letter was filed OCM already had received leased access rates from TCI, noting that a copy of its rates was attached to OCM's letter. TCI states further that new leased access rates were provided to OCM in a letter dated October 3, 1994, and asserts that the petition was groundless when filed, is certainly moot now, and therefore should be dismissed.

3. On March 23, 1995, the Commission received a letter dated March 19, 1995 from OCM in reply to TCI's response. The OCM letter in reply states that OCM has made several efforts since the filing of the petition to obtain schedules of rates from TCI, which have not been fully satisfied. For example, OCM states that it has requested rates for each of TCI's systems in Oregon that are large enough to be required to designate leased access capacity. OCM states that it has requested "a complete, inclusive schedule, not examples, of rates for the following systems," naming some eighteen separate Oregon communities.[5] It points out that the schedule provided in an October 3, 1994 letter attached to TCI's response contained only a single quotation for an hour that was not mentioned in OCM's requests.[6] To operate effectively as an independent programmer, OCM states that it needs to know enough about costs, including channel capacity costs, in each instance to determine what business plan to pursue, and that such is possible only if TCI will provide it with complete rate information.

II. BACKGROUND

4. In 1984, Congress amended the Communications Act of 1934 by adding among other things a commercial leased access requirement, pursuant to which cable operators with 36 or more activated channels must set aside part of their channel capacity for use by programmers that are not affiliated with them.[7] The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates, and reasonable terms and conditions, for commercial leased access.[8] Pursu-

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[1] Public Notice of the filing of the OCM letter was released on September 30, 1994. *See* Public Notice - Cable Television Service Registration; Special Relief and Show Cause Petitions, No. 1005, released September 30, 1994, at p. 5.

[2] By letter dated February 3, 1995, the Commission's staff informed TCI that a search of the Commission's files had not disclosed the existence on file of a response to the OCM letter and requested TCI to file a response.

[3] *See* TCI Response, p.1.

[4] *Ibid.*

[5] *See* OCM letter to TCI, dated October 4, 1994 and attached to the reply.

[6] In another instance, OCM states that TCI first quoted a rate for both the Newport and Walport systems, but later withdrew Walport from consideration, but nonetheless stated that the rate for Newport alone would still be the same quoted amount.

[7] Communications Act of 1934, as amended, § 612, 47 U.S.C. § 532 (1992). The amount of channel capacity an operator must set aside is based on a system's activated channel capacity.

[8] Communications Act of 1934, § 612(c)(4)(A) & (B), 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

ant to that Congressional directive, the Commission established regulations applicable to leased access channels in its proceedings in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, (the *Rate Order)*, 8 FCC Rcd 5631 (1993), at ¶ ¶ 531-538. The new leased access regulations relevant to this case are found at 47 C.F.R. §§ 76.970, 76.971 and 76.975.

III. DISCUSSION

A. The Alleged Violation of Section 76.970(e)

5. The thrust of OCM's letter, which we will treat as a petition for relief filed under Section 76.975 of the rules,[9] and reply letter[10] is that OCM has made several efforts both before and after the filing of the petition to obtain complete schedules of rates from TCI for each of TCI's cable systems large enough to be required to designate leased access channels, and that the rate schedules requested have not been provided. It asserts that the rates which TCI has provided apply only for a few specific day parts, and that rate schedules have not been provided for each of TCI's cable systems, as requested.

6. TCI's response and the correspondence submitted with OCM's reply letter show that various sets of leased access rates have been provided to OCM since the filing of the petition. This suggests that TCI has not been as totally unresponsive to OCM's requests for rates and technical information as suggested in the petition. However, TCI's rate submittals consist of quotations of rates for a few specific time slots on specific cable systems. TCI has not shown that it has provided OCM with a complete schedules of part time rates for all day parts, or even with schedules of monthly rates for that matter. Nor has TCI shown that it has provided the requested rates for each of the cable systems serving the several communities for which requests for rates have been made.[11] Although we cannot find on this record that TCI has completely refused to provide OCM with leased access rates, we must find that TCI has not fully complied with the requirements of Section 76.970(e) of the rules by providing all of the schedules of rates which OCM has requested for all of the cable systems to which those requests were directed.[12]

B. Maximum Monthly Rates

7. Accordingly, TCI will be required, pursuant to Section 76.970 of the rules,[13] to establish and provide to OCM a schedule of leased access rates applicable to prospective leased access customers for each cable system serving the communities for which a request has been made by OCM and for which it is required to designate leased access channels.[14] Additionally, TCI will be required to keep on file and make available for Commission inspection information showing the number of subscribers for these systems as of March 31, 1995 and any other relevant data, information, and supporting calculations used to determine the maximum monthly implicit net fees, as provided by Section 76.970 of the rules.[15]

C. Schedule of Part Time Rates

8. We will also require TCI to establish a schedule of part-time rates for all day parts for each of the cable systems serving the communities for which OCM has requested rates. We will also require it to maintain on file adequate records, consistent with Section 76.970(e) of our rules, that show the total monthly revenues derived from part time users of each leased access channel and the maximum monthly charge for a full leased access channel for each cable system. We note, in this regard, that in order to assure that a cable operator's maximum monthly rate is not exceeded by the revenues generated from charges for part-time channel capacity, we have in other cases required cable operators to establish a schedule of rates, or rate card, for different times of day pursuant to which, if all times were used, the sum of the part-time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules.[16] We have required that such rate structure be reasonably reflective of empirical time of day values and not serve merely as a mechanism to retard use.[17]

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[9] A failure by a cable operator to provide a schedule of rates upon request by an independent programmer constitutes a violation of Section 76.970(e), which states, in part, that "[u]pon request, a schedule of commercial leased access rates shall be provided to prospective leased access programmers." *See* 47 C.F.R. § 76.970(e). We construe OCM's terse statement that the TCI "has not made available its current schedule of leased access rates" (*See* ¶ 1 above) as providing a sufficient "concise statement of facts constituting a violation of the statute or the Commission's Rules," as required by Section 76.975(c).

[10] As noted above, TCI filed a response only after the petition had been called to its attention by the Commission's staff. (*See* n.2.) For that reason, we will consider OCM's reply letter, the filing of which was not otherwise authorized by Section 76.975 of the rules. The reply letter, like TCI's response, contains factual information about matters that have occurred since the filing of the petition. We believe that our consideration of the information provided in both pleadings will provide a better understanding of our regulations applicable to leased access matters and thus serve the public interest.

[11] The Commission has stated that a "sufficient allegation of a violation shifts the burden of production to the operator, who must then come forward with evidence showing conduct in keeping with our rules." *See* Rate Order at ¶535, n.1357. *See also* 47 C.F.R. § 76.975(e).

[12] Section 76.970(e) states, in part, that "[u]pon request, a schedule of commercial leased access rates shall be provided to prospective leased access programmers." *See* 47 C.F.R. § 76.970(e).

[13] *See* 47 C.F.R. § 76.970.

[14] *See* 47 U.S.C. § 532(b).

[15] Our rules require that the implicit fee charged unaffiliated leased access programmers be calculated for each category "by determining the monthly price per subscriber that the operator pays to carry the programming of unaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. The difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming." 47 C.F.R. § 76.970(c). The rules further require that "the highest net fee shall be based on contracts in effect in the previous calendar year." 47 C.F.R. § 76.970(d).

[16] *See e.g.*, TV-24 Sarasota vs. Comcast Cablevision of West Florida, 10 FCC Rcd 3512 (Cab. Serv. Bur. 1994) at 24-29.

[17] *Id.*

D. Technical Concerns

9. OCM asserts in its reply letter that TCI has quoted $50 per hour as costs for technical support and $1,600 per month as the cost of handling a new tape per week at two headends. OCM requests the Commission to "provide the formula by which they (sic) calculate an ongoing, unavoidable level of 'technical support' and justify both the cost and the amount of time."[18] The Commission recognized in the *Rate Order* that a minimal level of technical cooperation is likely to be necessary in order for a cable operator to deliver leased access programming over a cable system and prohibited cable operators from unreasonably refusing to cooperate in the provision of channel capacity.[19] Although no specific regulations were adopted that address the costs of providing the technical support matters raised by the petition, the Commission has required, in Section 76.971(c) of the rules, that cable operators offer to leased access programmers the same services that would be offered to comparable programming services that use its non-leased access channel capacity and that they demand reimbursement only for the reasonable cost of such services. We will require that TCI comply with these requirements.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition Oregon Coast Magazine ("OCM") IS GRANTED to the extent indicated above and in all other respects IS DENIED.

11. IT IS FURTHER ORDERED that TCI Cablevision of Oregon, Inc. ("TCI") shall, within thirty days of the release date of this order, (a) provide to OCM a schedule of monthly leased access rates for each cable system serving the communities for which OCM has requested rates and for which it is required to designate leased access channels and (b) maintain on file information showing the number of subscribers to its cable systems in each of those communities as of March 31, 1995 and any other data, information and calculations used to determine the maximum implicit fees for leased access, as provided in Section 76.790 of the Commission's rules.

12. IT IS FURTHER ORDERED that TCI shall, within thirty days of the release date of this order, (a) establish a reasonable schedule of rates, or rate card, for all times of day for each cable system serving the communities for which OCM has requested rates, and (b) maintain on file adequate records, consistent with Section 76.970(e) of our rules, which show that, if all times were used, the sum of the part-time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules.

13. IT IS FURTHER ORDERED that TCI shall provide OCM the same technical services that it provides to comparable programming services that use its non-leased access capacity and shall demand reimbursement only for the reasonable cost of such services.

14. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[18] *See* OCM reply, p. 2.

[19] *See* Rate Order, ¶ 500.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INVESTIGATION OF TELCO COMMUNICATIONS GROUP d/b/a DIAL & SAVE, Telecommunications Service to Cuba — File No. ENF-95-07

ORDER

Adopted: August 2, 1995; Released: August 21, 1995

By the Deputy Chief, Common Carrier Bureau:

1. In March 1995, the Common Carrier Bureau (Bureau), Enforcement Division, initiated an investigation of Telco Communications Group d/b/a Dial & Save (Dial & Save) following receipt of information indicating that Dial & Save had provided international telephone services to Cuba without the requisite authorization from the Commission.

2. The Bureau's Enforcement Division has reached an agreement with Dial & Save that would resolve this proceeding. The terms and conditions of the agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are hereby incorporated by reference.[1]

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Consent Decree, incorporated by reference herein, IS HEREBY ADOPTED.

5. IT IS FURTHER ORDERED that the above-referenced proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INVESTIGATION OF TELCO COMMUNICATIONS GROUP d/b/a DIAL & SAVE, Telecommunications Service to Cuba — File No. ENF-95-07

CONSENT DECREE

1. In March 1995, the Common Carrier Bureau's Enforcement Division initiated an investigation of Telco Communications Group d/b/a Dial & Save (Dial & Save) after receiving information that Dial & Save had provided international telephone service to Cuba from certain U.S. locations without the requisite authorization from the Commission.

2. For purposes of this Consent Decree, the following definitions apply:

(a) "Commission" means the Federal Communications Commission;

(b) "Bureau" means the Commission's Common Carrier Bureau;

(c) "Enforcement Division" means the Bureau's Enforcement Division;

(d) "Dial & Save" means Telco Communications Group d/b/a Dial & Save or any other similar telecommunications entity, affiliate, subsidiary, successor or company controlled directly or indirectly by officers or directors of Dial & Save, or in which those officers or directors have or had an interest.

(e) "The Parties" means the Enforcement Division and Dial & Save.

(f) "The Act" means the Communications Act of 1934, as amended.

(g) "Order" means the order of the Bureau adopting the terms and conditions of this Consent Decree and formally terminating the above-captioned proceeding;

(h) "Effective date of this Consent Decree" is the date that the Order adopting the terms and conditions of this Consent Decree is released.

3. Dial & Save admits the jurisdiction of this Commission over it and its current and former principals and over the subject matter of this action for the purpose of this Consent Decree and any Order in recognition of the cost of enforcement actions which ensure compliance with the Communications Act and the Commission's rules.

[1] Voluntary contributions to the U.S. Treasury should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Telco Communications Group's check or money order to "File No. ENF-95-07." Remittances should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482. 47 C.F.R. § 1.80(h).

4. Dial & Save agrees that, upon execution by both parties to this Consent Decree, the provisions of this Consent Decree shall be incorporated by reference in the Order, as described in paragraphs 7 and 10 below, formally adopting this Consent Decree and terminating the proceeding.

5. Dial & Save waives any right it may have to appeal the Order, as described in paragraphs 7 and 10 below.

6. In consideration for the termination of this proceeding in accordance with the terms of this Consent Decree, Dial & Save agrees to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. Dial & Save agrees to the following terms, conditions and procedures without admitting or denying any of the alleged violations which led to this proceeding or admitting any other violations of law, rules or policy.

(a) Dial & Save agrees to make a voluntary contribution to the United States Treasury, without further protest, or recourse to a trial de novo, in the amount of $5,000.00 within 10 days of the date on which the Order is released.

(b) Dial & Save avers that it has filed and established effective schedules of charges with respect to its domestic and international common carrier services in accordance with Section 203(c) of the Act and Part 64 of the Commission's rules implementing such sections of the Act. Dial & Save further avers that it has established policies and procedures designed to ensure that the requirements of the Act and the Commission's rules are fully addressed in connection with the provision of any common carrier telecommunications service from the United States to any foreign country.

(c) Finally, Dial & Save avers that, for the relevant period of time--October 21, 1994 through November 15, 1994--it was allegedly providing service without adequate Commission authorization, Dial & Save, on its own initiative, issued customer credits for all calls made on its network to Cuba (outside of Guantanamo Bay) prior to November 16, 1994, whether or not the caller requested such credit.

7. In light of the covenants and representations contained in this Consent Decree, and in express reliance thereon, the Enforcement Division agrees that adoption of this Consent Decree by Order of the Bureau shall constitute a decision to terminate its investigation in the above-captioned proceeding without any finding of violation or liability on the part of Dial & Save. This Consent Decree disposes of any possible fines or penalties, including forfeitures, related to the conduct described in paragraph 1, above, for the period of time of October and November 1994. In the event of misconduct occurring outside this time period, nothing in this Consent Decree shall prevent the Commission from adjudicating complaints filed against Dial & Save alleging such misconduct, or from instituting a new investigation and/or enforcement proceeding against Dial & Save, including the revocation of Dial & Save's blanket authority to function as a resale carrier. If such an enforcement proceeding is initiated, Dial & Save's earlier conduct may be adduced, but not for the purpose of assessing monetary forfeitures.

8. Dial & Save agrees that any violation of the Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

9. Dial & Save and the Enforcement Division further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the File No. ENF-95-07 proceeding, issuance of an Order as described herein, and the compliance by Dial & Save with the terms and conditions in paragraphs 3-6, 8 and 10. If the Consent Decree is not signed by all the parties or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and shall not become part of the record in the ENF-95-07 proceeding nor may it be used in any fashion by any party in a legal proceeding.

10. If the Commission brings an action in United States District Court to enforce the terms of the Order, Dial & Save agrees that it will not contest the validity of the Order, will waive its statutory right to a trial de novo, and will consent to a judgement incorporating the terms of this Consent Decree.

For: Telco Communications Group d/b/a Dial & Save

/s/ Donald A. Burns — July 10, 1995
Donald A. Burns, President — Date

For: Enforcement Division
Common Carrier Bureau
Federal Communications
Commission

/s/ Gregory A. Weiss — July 13, 1995
Gregory A. Weiss — Date
Deputy Chief (Operations)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-134

In the Matter of

Amendment of Section 73.202(b), RM-8679
Table of Allotments,
FM Broadcast Stations.
(Sanford, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 10, 1995; Released: August 21, 1995

Comment Date: October 12, 1995
Reply Comment Date: October 27, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Woolstone Corporation ("petitioner") requesting the allotment of Channel 276A to Sanford, North Carolina, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 276A to Sanford since it could provide the community with its second local FM service. Channel 276A can be allotted to the community with a site restriction of 11.3 kilometers (7 miles) west to avoid a short-spacing to vacant but applied-for Channel 275A, Raleigh, North Carolina.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sanford, North Carolina	288A	276A, 288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 12, 1995**, and reply comments on or before **October 27, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

A. Wray Fitch III, Esq.
Gammon & Grange
Seventh Floor
8280 Greensboro Drive
McLean, VA 22102-3807
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 276A at Sanford are 35-26-28 North Latitude; 79-17-11 West Longitude. Use of this site does not negate the short-spacing to Station WUAG, Channel 276D, Greensboro, North Carolina. However, Class D stations are secondary services and thus not entitled to protection from full-service FM stations. *See* Section 74.702 of the Commission's Rules and *Pueblo, Colorado*, 8 FCC Rcd 4752 (1993).

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-265

In re Application of

PINE TREE MEDIA, INC. File No. BR-900817UF

For Renewal of License of Station KARW
Longview, Texas

Appearances

Dennis J. Kelly, Esq. on behalf of Praise Media, Inc.; *Gary P. Schonman, Esq.* and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: August 15, 1995; Released: August 21, 1995

PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Forfeiture*, 8 FCC Rcd 7591 (1993) (*"HDO"*), the Commission designated the application of Pine Tree Media, Inc. ("Pine Tree") for renewal of license of Station KARW(AM), Longview, Texas, for hearing on the following issues:

> (1) To determine whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 and/or Section 73.3541 of the Commission's Rules.
>
> (2) To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf misrepresented facts in the station's 1990 renewal application.
>
> (3) To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf violated Section 73.1015 of the Commission's Rules by failing to respond fully to Commission correspondence dated September 9, 1992, September 23, 1992, December 3, 1992, and/or February 10, 1993.
>
> (4) To determine whether Station KARW is in compliance with the following Commission rules: Section 1.1307(b) (Environmental Assessment); Section 17.21 through 17.23 (tower painting); Section 73.932 (emergency broadcast equipment); Section 73.1745(a) (transmitter power); Sections 73.1800 and 73.1820 (station logs); and Section 73.3526 (public file).
>
> (5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the application of Pine Tree Media, Inc. for renewal of license of Station KARW should be granted.

2. The *HDO*, at Section 16, placed the burden of proceeding with the introduction of evidence and the burden of proof on "Pine Tree Media, Inc., its successors or assigns, and/or those now in control of Pine Tree Media, Inc., as appropriate."

3. By *Order*, FCC 95M-64 (released March 2, 1995), the Presiding Judge added the following issues against Pine Tree:

> (1) To determine whether Pine Tree has the capability and intent to expeditiously resume broadcast operations of KARW(AM) consistent with the Commission's Rules.
>
> (2) To determine whether Pine Tree has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
>
> (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Pine Tree is qualified to be and remain the licensee of Station KARW(AM).

4. Hearings on all of the issues were held in Washington, D.C., on March 21-22, 1995. The record in this proceeding was closed on May 24, 1995. See *Order*, FCC 95M-132 (released May 26, 1995).

FINDINGS OF FACT

Transfer of Control Issue

5. On November 10, 1988, the Commission granted an application for consent to the transfer of control of Pine Tree Media, Inc. ("Pine Tree") from Herbert Wren ("Wren") and Earl Jones ("Jones") to Kenneth Tuck ("Tuck"). Wren, Jones, and Tuck consummated the transfer of control on December 12, 1988. No ownership report was filed. Tuck apparently died sometime in May 1990 (MMB Ex. 1, pp. 1 and 2).

6. Thereafter, on May 17, 1990, the promissory note made by Tuck in payment for the stock of Pine Tree and assets of KARW(AM) was transferred by Wren and Jones to American Plastics Products, Inc. ("American Plastics"). As consideration for the transfer of the Tuck note to American Plastics, Wren and Jones received a promissory note from American Plastics. American Plastics subsequently foreclosed on the Tuck note, acquired the stock of Pine Tree and the assets of KARW(AM), and commenced operating the station. No application for consent to the transfer of control of Pine Tree was filed with the Commission (MMB Ex. 1, p. 2).

7. On August 6, 1991, Wren and Jones foreclosed on the American Plastics note, reacquired the stock of Pine Tree and the assets of KARW(AM), and took over the operation of the station. No application for consent to the transfer of control of Pine Tree was filed with the Commission (MMB Ex. 1, pp. 2 and 3).

8. On February 10, 1992, Eugene Washington and Ray Lee Williams, acting on behalf of Praise Media Inc. ("Praise Media"), executed several documents evidencing

the purchase from Wren and Jones of certain real and personal property comprising KARW(AM) (Praise Ex. 2, p. 5; MMB Ex. 1, Attachment 5). After the transaction was consummated, Praise Media began operating KARW(AM) (Praise Ex. 2, pp. 6-7). No application for consent to the assignment of license of KARW(AM) to Praise Media was filed with the Commission (Praise Ex. 2, p. 6). It was then the belief of Janet Washington, Praise Media's third principal, that the license could be transferred to Praise Media at some unspecified time after Praise Media had paid off its note in full to Wren and Jones (Praise Ex. 2, p. 6).

9. Praise Media was incorporated on March 19, 1992 in the state of Texas. Initially, Eugene Washington was President, Ray Lee Williams was Vice President and Janet Washington was Treasurer. Although the company never issued any stock certificates, the planned ownership structure was for Mr. Washington to own 60 percent of Praise Media, Ms. Washington to own 15 percent of Praise Media and Williams to own 25 percent upon contributing cash or allowing the station to retain his commissions for any advertising sales made by him. Williams made no cash contributions under either option, and he is no longer considered a Praise Media shareholder. Mr. Williams was voted out of his position as Vice President in December, 1992 (Praise Ex. 3, p. 1).

10. At present, Ms. Washington is the only active owner, officer or director of Praise Media. Mr. Washington was incarcerated on drug charges (Praise Ex. 3, p. 1). On July 22, 1994 he gave to Ms. Washington a "Power of Attorney" giving her plenary authority over his property situated *inter alia* in Longview, Gregg County, Texas, and further authorized her to operate and conduct the business of Praise Media and KARW(AM) Radio Station, situated in Longview, Gregg County, Texas (Praise Ex. 12, p. 2). A quit claim deed was filed in Gregg County, Texas conveying Mr. Washington's interest in the station to Ms. Washington (Tr. 71-72), and Mr. Washington is being formally removed as an officer of Praise Media (Praise Ex. 3, p. 1; Tr. 72).

11. Ms. Washington, the only individual to testify at the hearing, has no personal knowledge about events which preceded Praise Media's involvement in KARW(AM). Neither Wren nor Jones nor any principal of Pine Tree or American Plastics offered any testimony or other evidence under this issue.

Misrepresentation Issue

12. On August 17, 1990, the captioned application for renewal of license of KARW(AM) was filed with the Commission. The applicant in the renewal application is identified as "KLGV - Ken Tuck - Pine Tree Media, Inc."[1] The application bears the signature of "Robert D. Murray" who is identified on the form as "General Manager" of the station (Praise Ex. 6, Attachment A).

13. Although the renewal application references "Ken Tuck" and "Pine Tree," Tuck apparently had died several months before the renewal application was filed, and American Plastics, not Pine Tree, was operating KARW(AM) at the time the renewal application was submitted to the Commission. Murray was never a principal of Pine Tree, and the record is silent as to the nature of his role in American Plastics beyond that of General Manager of KARW(AM). Praise Media disavows any knowledge about events surrounding the filing of the renewal application, and neither Murray nor anyone else associated with American Plastics offered any evidence under this issue (Praise Ex. 6).

Failure to Respond to Commission Correspondence

14. On September 9, 1992, the Commission directed a letter of inquiry to Mr. H. E. Ferrell, c/o Pine Tree Media, Inc., regarding KARW(AM). The letter sought, among other things, to ascertain whether an unauthorized transfer of control of KARW(AM) had occurred. Praise Media was operating KARW(AM) at the time, and Janet Washington received the letter of inquiry. Because the letter was addressed to Pine Tree rather than Praise Media, and it pertained to activities at KARW(AM) which preceded Praise Media's involvement at the station, Janet Washington decided it was unnecessary to respond to the letter (Praise Ex. 4, p. 1; MMB Ex. 1, pp. 45-47).

15. On September 23, 1992, the Commission directed a second letter of inquiry to Pine Tree. The second letter notified Pine Tree of a deficiency in the pending renewal application for KARW, and it requested the station to submit "appropriate corrective amendments." It also noted that prior attempts to communicate with the licensee had been unsuccessful and requested information as to whether the station was still operating. Janet Washington received the second letter of inquiry and forwarded it to Eugene Washington in Chicago. Praise Media did not respond to this letter (Praise Ex. 4, p. 2; MMB Ex. 1, pp 49-50).

16. On December 3, 1992, the Commission directed a third letter to Pine Tree regarding KARW(AM). In its third letter, the Commission requested a response to the first (September 9, 1992) letter, and advised that failure to respond to that letter within 15 days could result in the imposition of sanctions. The Commission also noted that it views a failure to respond to official correspondence as a serious matter. Janet Washington received the third letter of inquiry and forwarded it to Eugene Washington in Chicago. Nearly two months later the Mass Media Bureau ("MMB") received a letter, dated January 26, 1993, from Praise Media. In addition to being unsigned, Praise Media's letter failed to respond to several of the questions that the licensee had been directed by the Commission to answer in the three letters of inquiry (Praise Ex. 4, pp. 2 and 3; MMB Ex. 1, pp. 52-53 and 55-78).

17. On February 10, 1993, the Commission sent a fourth letter of inquiry to Pine Tree regarding KARW(AM). The fourth letter included copies of the previous three, and it identified the specific deficiencies in Praise Media's January 26, 1993, correspondence. It noted, for example, that in response to a request to identify the principals of Pine Tree, Praise Media had responded "See enclosed letter." But no letter was enclosed. Pine Tree was warned that failure to respond within 15 days to the Commission's fourth letter could result in the imposition of administrative sanctions, including designation for hearing. Praise Media did not respond to this fourth letter. According to Janet Washington, she did not respond because she had no additional information to provide (Praise Ex. 4, p. 3; MMB Ex. 1, pp. 80-82).

[1] The station's call sign was formerly KLGV.

Technical Issues

18. Praise Media presented no evidence to meet its burdens under this issue insofar as the licensee's compliance with Section 1.1307(b) (Environmental Assessment) is concerned. Praise Media does maintain, though, that it has properly painted its tower, in compliance with Section 17.21 through 17.23 of the Commission's Rules; installed Emergency Broadcast System equipment, in compliance with Section 73.932 of the Commission's Rules; monitored and regulated (until such time as the station went off the air) KARW(AM)'s transmitter power, in compliance with Section 73.1745(a); and ensured that KARW(AM)'s transmitter logs (until such time as the station went off the air) and public inspection file comply with Section 73.1800, 73.1820 and 73.3526 of the Commission's Rules (Praise Ex. 5, p. 1).

Resumption of Operations Issue

19. On September 13, 1994, KARW(AM) went off the air because of vandalism and equipment problems (Tr. 220-222). Station KARW(AM) returned to the air at the end of September or the beginning of October. After a few weeks, the station went off the air again because of mechanical problems. On November 18, 1994, before the problems could be rectified, Southwestern Electric Power Company ("SWEPCO") disconnected electric power to the station because of non-payment by Praise Media, of its electric bills (MMB Ex. 3). Thus, KARW(AM) has remained silent ever since.

20. Janet Washington estimates that to put the station back on the air Praise Media will require at least $30,000 to purchase a replacement transmitter and other materials (Tr. 240, 242). Initially, Janet Washington testified that she had already placed money in escrow to purchase the necessary equipment (Tr. 93). However, she subsequently testified that she did not have money in escrow with which to put the station back on the air (Tr. 237). Janet Washington also testified that Praise Media had already received a loan from a lending institution (Tr. 224-225). However, documents relating to this loan establish that Praise Media has only applied for a loan (Praise Exs. 9-11). Janet Washington also testified that she has arranged for a loan from an undisclosed friend (Tr. 237). However, she has received nothing in writing from the friend indicating his willingness to provide Praise Media with any money. Other than Janet Washington's testimony, Praise Media offered nothing to support the availability of this loan (Tr. 239). Furthermore, Janet Washington concedes that neither she nor Praise Media has any present intention of spending any money for the purpose of putting KARW(AM) back on the air until the status of the station's license is resolved in Praise Media's favor (Tr. 93, 222, 241).

Silent Station Rules Issue (Section 73.1740 and 73.1750)

21. Although Janet Washington on September 12, 1994, prepared a brief letter notifying the Commission that "due to vandalism and theft of equipment," KARW(AM) was off the air and would remain silent until the stolen equipment was replaced (Praise Ex. 7), the correspondence was never filed with the Commission. Janet Washington also telephoned the Commission in an attempt to orally inform the agency that KARW(AM) had ceased operations. Although she spoke with Commission employees in several different offices, Janet Washington was not successful in finding the correct office to inform (Tr. 83-90; Praise Ex. 7).

Lack of Candor/Misrepresentation

22. The MMB advances that misrepresentation and lack of candor findings regarding Janet Washington's testimony at the hearing should be made. The MMB maintains that Janet Washington lacked candor in her testimony about the availability of a loan to help restore KARW(AM) to operational status and dissembled concerning KARW(AM)'s silent status, her lawsuit against electric company official and her husband's incarceration.

23. Although no misrepresentation/lack of candor issues had been specified against Praise Media and Janet Washington, it is axiomatic that the credibility of a witness is always at issue. No issue need be specified in this respect. *See RKO General, Inc.*, 78 FCC 2d 104 (1980). A misrepresentation is a false statement of fact made with the intent to conceal. Lack of candor involves concealment, evasions and other failures to be fully informative. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983).

24. *Availability of Loan.* At Tr. 224-225, Janet Washington alleged that she had a loan in place to help restore KARW(AM) to operational status. However, the documents she produced in support of this assertion (Exhibits 9, 10 and 11) indicate only that Janet Washington applied for a loan. At Tr. 92 and 95, Janet Washington alleged that she had invested nearly $200,000 in the radio station since taking it over. Later in her testimony she disclosed that of the $200,000 mentioned, $20,000 came from Don Grant who gave her the money in a single lump sum which she counted out (Tr. 192-95). However by letter dated May 19, 1995, counsel for Praise Media stated that Don Grant's loan was not made all at once, but over time (MMB Ex. 10, p. 1; Tr. 320-21).

25. *KARW(AM)'s Silent Status and Lawsuit Against Birdsong.* At Tr. 149-150, Janet Washington testified that KARW(AM) continued to receive electric power after November 18, 1994. She claimed to have had personal knowledge that the electricity was on when she visited KARW(AM) in December 1994 (Tr. 142-143). After testifying that the station had power in December, Janet Washington was shown a letter, dated January 26, 1995, from B. M Birdsong, Area Manager for SWEPCO. In his letter Mr. Birdsong stated that electric power to KARW(AM) had been off continuously since November 18, 1994 (MMB Ex. 3). Janet Washington claimed that the letter was "totally incorrect;" she attacked Birdsong personally, asserting that "this is why Mr. Birdsong is going to court;" and she testified unequivocally that Birdsong "is currently being sued" by her for informing the Commission that the station was off the air because of lack of electricity. The next day, however, Janet Washington returned to the witness stand and conceded that KARW(AM) was in fact without any electric power during the month of December (Tr. 132, 158). Further, she testified that she has no lawsuit pending against the SWEPCO official (Tr. 290).

26. *Eugene Washington's Incarceration.* Janet Washington indicated that Eugene Washington was unavailable to testify in this proceeding because he is incarcerated. When pressed as to why her husband is in prison, Janet Washington claimed that she did not know the reason for his incarceration. However, in direct written testimony given months earlier, Janet Washington had represented that Eugene Washington is serving time in a federal prison on drug-related charges (Praise Ex. 3, p. 1). The next day, while still claiming she did not know the "exact reason"

for Eugene's incarceration, she testified that the charge was "[a] drug conspiracy, wire tapping or something like that." (Tr. 290).

CONCLUSIONS OF LAW

Transfer of Control Issue

27. Pine Tree is the licensee of record. It is undisputed that an unauthorized transfer of control occurred in 1990 when American Plastics took over KARW(AM) and in 1991 when Wren and Jones reacquired the station. Praise Media acquired control of KARW(AM) on February 10, 1992 and it readily concedes that the Commission never approved this transfer.

28. Section 310(d) of the Communications Act of 1934, as amended, states in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit for license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

29. It follows that each of the above cited transfers was made in violation of Section 301(d) of the Communications Act of 1934, as amended. The transfer of control must be and IS RESOLVED against Pine Tree and against Praise Media.

Misrepresentation Issue

30. The misrepresentation issue deals with the allegations made in the renewal application for KARW(AM) filed on August 17, 1990. Pine Tree did not appear in this proceeding and did not otherwise respond to this issue. This issue IS RESOLVED against Pine Tree.

31. This misrepresentation issue specified in the HDO does not concern Praise Media since Praise Media was in no way involved in the preparation or filing of the renewal application for KARW(AM).

Failure to Respond to Commission Correspondence

32. The record reflects that the Commission directed mailings to Pine Tree Media on September 9, 1992, September 23, 1992 and December 3, 1992. Janet Washington disregarded the first mailing because it was not addressed to her even though Praise Media claims to be a successor in interest to Pine Tree Media. She forwarded the other two mailings to Eugene Washington in Chicago. Praise Media finally filed a response, though incomplete, on January 26, 1993. A fourth Commission letter was sent February 10, 1993, but Praise Media did not respond to this letter.

33. Section 73.1015 of the Commission's Rules provides:

> The Commission or its representatives may, in writing, require from any applicant, permittee, or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to any other matter within the jurisdiction of the Commission . . . .

34. All of the Commission's letters addressed important and urgent matters. They also warned the addressee of dire consequences upon failure to respond. Praise Media as successor to Pine Tree Media was grossly negligent in failing to respond promptly and correctly to the Commission's inquiries. Janet Washington's failure to respond to official Commission inquiries manifests that she is unreliable and renders Praise Media unfit to hold the KARW(AM) license. The issue IS RESOLVED against Praise Media.

Technical Issue

35. Praise Media's allegations that it has complied with Sections 17.21 through 17.23 (tower painting); Section 73.932 (emergency broadcast equipment); Section 73.1745(a) (transmitter (power); Sections 73.1800 and 73.1820 (station logs); and Sections 73.3526 (public file) have not been challenged. Praise Media, however, has failed to provide the Environmental Assessment required by Section 1.1307(b) of the Commission's Rules and the MMB requests that any grant herein should be conditioned on Praise Media submitting a proper Environmental Assessment. The issue IS RESOLVED favorably except that the Environmental Assessment is still outstanding.

Resumption of Operations Issue

36. Station KARW(AM) has been off the air since at least November 18, 1994, in part, because Praise Media cold not afford to pay the station's electric bill. The record shows that Praise Media does not have the present wherewithal to restore station operation nor is Janet Washington inclined to restore station operation pending the resolution of the license status. Praise Media is in no position to expeditiously return KARW(AM) to the air. The issue IS RESOLVED against Praise Media.

Silent Station Rules Issue

37. The record is clear that although she may have tried, Janet Washington failed to notify the Commission that KARW(AM) went off the air on September 13, 1994. Furthermore at no time did Praise Media request authority from the Commission for KARW(AM) to remain silent beyond 30 days. These failures are clearly in violation of the Commission's Rules. Section 73.1740(a)(4) of the Commission's Rules provides that:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later that the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the

allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuation of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

The issue IS RESOLVED against Praise Media.

Testimony - Misrepresentation/Lack of Candor

38. The record indicates that Janet Washington has made numerous false statements during her testimony. The statements were made to mislead the Commission into acting favorably on the issues specified in this proceeding. Although some false statements were recanted or modified, the overall demeanor of this witness manifested that she cannot be relied upon to be at all times truthful. In light of this, it is concluded that Janet Washington d/b/a Praise Media is not qualified to be a Commission licensee.[2]

ULTIMATE CONCLUSIONS

39. Pine Tree has not appeared in this proceeding to address the issues specified against it. The record is clear that Pine Tree, without Commission authority transferred control of its license twice; once to American Plastics and then to Praise Media. The record also contains ample evidence that Praise Media, the alleged successor to Pine Tree, is not qualified to be a Commission licensee.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the renewal application of Pine Tree Media, Inc. (File No. BR-900817UF) and its alleged successor in interest, Praise Media, Inc. IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

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[2] Praise Media argues that Praise Media's rule violations should be overlooked because they are no more egregious than the violations of applicants in certain other cases where the Commission resolved the specified issues favorably. The cases cited in support are totally inapposite. None bear the least resemblance to the fact situation herein. Praise Media's argument is deemed specious and is rejected.

[3] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CELLULARVISION OF NEW YORK, L.P. CSR 4478-P

v.

SPORTSCHANNEL ASSOCIATES,

Program Access Complaint Pursuant to
47 C.F. R. § 76.1003

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1995 **Released: August 24, 1995**

By the Chief, Cable Services Bureau

INTRODUCTION

1. On February 22, 1995, CellularVision of New York, L.P. ("CellularVision" or "complainant") filed a Program Access Complaint ("Complaint") against Prime SportsChannel Network[1] alleging discrimination in the sale of satellite cable programming in violation of Section 628(c)(2)(B) of the Communications Act of 1934, as amended, [2] and Section 76.1002(b) of the Commission's rules.[3] SportsChannel filed an Answer to the complaint on March 24, 1995, and CellularVision filed a Reply on April 12, 1995.

2. Based on the record before us and pursuant to the Commission's rules, we find that SportsChannel discriminated against CellularVision in the sale of satellite cable programming in violation of Section 628(c)(2)(B) of the Communications Act and Section 76.1002(b) of the Commission's rules.

BACKGROUND

3. In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),[4] Congress found that as a result of increased vertical integration between cable operators and cable programmers, "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[5] To address certain unfair competitive practices restricting competition between cable operators and other multichannel video programming distributors, Congress enacted new Section 628 of the Communications Act, which contains both a general prohibition against such practices and provisions directing the Commission to adopt rules proscribing specific conduct. Section 628(b) states:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

Section 628(c)(2)(B) directs that regulations to be promulgated by the Commission shall:

> prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups . . . .[6]

4. In its *First Report and Order* adopting regulations pursuant to Section 628,[7] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify in the *First Report and Order* all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's

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[1] CellularVision subsequently amended the caption in the case to name SportsChannel Associates as the defendant. *See infra*, ¶21. References to "SportsChannel" or "defendant" in this order refer to SportsChannel Associates, the corporate entity that defendant states controls the programming at issue in this case. *See* Answer at 19.

[2] 47 U.S.C. § 548(C)(2)(B) ("Communications Act").

[3] 47 C.F.R. § 76.1002(b).

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 1992 Cable Act § 2(a)(5).

[6] There are exceptions to this general rule against discrimination. Section 628(c)(2)(B) allows a programming vendor to: (i) impose reasonable requirements for credit worthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establish different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establish different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or (iv) enter into an exclusive contract that is otherwise permitted under the Commissions regulations. 47 U.S.C. §548(c)(2)(B).

[7] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order*, 8 FCC Rcd 3359 (1993) (*"First Report and Order"*). The Commission's program access regulations track the language of Section 628(c)(2)(B).

'unreasonable refusal to sell', or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor."[8] The Commission cautioned, however, that "unreasonable" refusals to sell" should be distinguished from "certain legitimate reasons that could prevent a contract between a vendor and a particular distributor."[9]

SUMMARY OF THE PLEADINGS

5. CellularVision states that it operates a wireless, cellular-based multi-channel video delivery system ("LMDS") in Brighton Beach, Brooklyn and that defendant is a satellite cable programming vendor that produces and distributes satellite cable programming, including SportsChannel New York.[10] CellularVision further states that Cablevision Systems Corporation ("Cablevision"), a cable operator, has an attributable interest in defendant, as defined in Section 76.1000(b) of the Commission's rules.[11]

6. CellularVision alleges that defendant has refused to provide its SportsChannel New York programming to CellularVision, despite the fact that CellularVision has provided all of the information requested by defendant regarding CellularVision's LMDS system.[12] CellularVision further alleges that defendant licenses its programming to two of CellularVision's competitors, Cablevision's Brooklyn cable system and Wireless Cable of New York. CellularVision contends that defendant's refusal to provide programming to CellularVision while at the same time providing programming to CellularVision's competitors is a violation of the program access provisions of the Communications Act, in particular Section 628(c)(2)(B), and of Section 1002(b) of the Commission's rules.[13]

7. CellularVision states that it has been trying to obtain SportsChannel programming for three years.[14] According to CellularVision, negotiations between the parties commenced in early 1992.[15] CellularVision states that in response to SportsChannel's inquiries, it provided defendant with basic information regarding CellularVision and its LMDS system in a January 17, 1992 letter.[16] In a follow-up letter, it provided SportsChannel with additional information about its system, credit references and its signal scrambling system.[17] CellularVision states that despite responding to defendant's inquiries, SportsChannel refused to offer its programming to CellularVision at that time.[18]

8. According to CellularVision, it renewed its inquiries about the availability of SportsChannel programming approximately two and one-half years after the initial negotiations in early 1992. CellularVision states that in response to its renewed inquiries, defendant requested essentially the same information concerning CellularVision's LMDS system as it previously had requested.[19] CellularVision states that it again provided defendant with the requested information, and that again, defendant did not offer its programming to CellularVision.[20] Instead, according to CellularVision, defendant made several requests for information concerning CellularVision's LMDS system, and in particular, the integrity of its signal security system.[21]

9. With respect to defendant's inquiries about the integrity of CellularVision's signal security system, CellularVision states that it made every effort to address defendant's concerns, including conducting an on-site demonstration of the system and providing an opportunity for defendant's representative to speak directly with a representative of Titan Information Systems Corporation ("Titan"), the manufacturer of the signal security system employed by CellularVision.[22] CellularVision states that, given defendant's continued inquiry about, and examination of, CellularVision's LMDS system over three years of negotiations, defendant's doubts about CellularVision's system are not reasonable.[23] CellularVision requests that the Commission order SportsChannel to sell SportsChannel programming to CellularVision for distribution by CellularVision's LMDS system in Brighton Beach, Brooklyn and any location within the New York Primary Metropolitan Statistical Area ("PMSA") which it serves, and further requests that the Commission consider imposing additional sanctions available under Title V of the Communications Act.[24]

10. In its Answer, defendant disputes CellularVision's characterization of the course of negotiations between the parties. According to defendant, the parties have been negotiating only since September 1994, contrary to CellularVision's claim that it has been attempting to obtain SportsChannel programming for nearly three years.[25] Defendant states that in early 1992, representatives of the parties engaged in "a handful of preliminary discussions" concerning a contract for SportsChannel programming, but the representatives "mutually agreed to defer any further discussions" until CellularVision had completed its trial phase.[26] SportsChannel further states that after these initial discussions, it did not hear again from CellularVision until late July 1994.[27] Thus, according to SportsChannel, there was no contact between the parties for two and one-half years after the initial contract discussions occurred.

11. Defendant contends in its Answer that it never has acted unreasonably during the course of its dealings with CellularVision, but that it merely has sought to obtain information regarding CellularVision's business, particu-

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[8] *First Report and Order*, 8 FCC Rcd at 3412.
[9] *Id.*
[10] Complaint at 1-2.
[11] Complaint at 2. In its Complaint, CellularVision named Prime SportsChannel Network as the defendant. Subsequently, in its Reply, CellularVision amended the caption of the case to reflect the fact that SportsChannel Associates is the corporate entity that controls the SportsChannel New York programming. CellularVision states in its Reply, and defendant admits, that Cablevision has an attributable interest in both Prime SportsChannel Network and SportsChannel Associates. *See* Answer at 1-2; Reply at 4.
[12] Complaint at 2.
[13] Complaint at 2-3; 8-9.
[14] Complaint at 3 and 9.
[15] Complaint at 3.
[16] *Id.*
[17] Complaint at 3-4.
[18] Complaint at 4.
[19] *Id.*
[20] *Id.*
[21] Complaint at 4-8. CellularVision documents correspondence between the parties from October 1994 until the Complaint was filed.
[22] Complaint at 7.
[23] Complaint at 9.
[24] Complaint at 10.
[25] Answer at 7.
[26] *Id.*
[27] Answer at 8.

larly its signal security system.[28] Defendant states that it has yet to receive satisfactory assurances and answers from CellularVision concerning the way in which it will secure the programming services it distributes.[29] Defendant further states that it continues to make a good-faith effort to continue discussions with CellularVision and to seek information to achieve an acceptable level of comfort with CellularVision's signal security system.[30]

12. In addition, defendant sets forth several of what it refers to as "affirmative defenses" in its Answer. First, defendant contends that the party named in the Complaint, Prime SportsChannel Network, does not control or possess the ability to control the licensing of the SportsChannel New York programming service.[31] According to defendant, the programming is controlled by SportsChannel Associates, which is a different legal entity than the named defendant, and the complaint therefore must be dismissed.[32]

13. Second, defendant states that CellularVision has not offered any evidence that defendant has "refused to deal" with CellularVision, and that in fact, the record is replete with evidence of defendant's willingness to negotiate and good-faith efforts to reach an agreement.[33] Defendant further argues that efforts to obtain information from CellularVision about its LMDS system cannot constitute a refusal to deal.[34]

14. Third, defendant argues that even if it could be shown that defendant has refused to deal with CellularVision, the Commission's rules proscribe only "unreasonable" refusals to deal.[35] According to defendant, it has acted reasonably throughout the course of the negotiations, and in fact, it is CellularVision that has acted unreasonably in resisting defendant's efforts to obtain information concerning CellularVision's signal security, channel line-up, roll-out schedule and marketing.[36]

15. Fourth, defendant contends that its requests for information regarding signal security were and are completely reasonable and justified under the 1992 Cable Act, and that CellularVision should not be allowed to use the Commission's rules to overcome its failure to provide defendant with sufficient comfort on such a critical matter.[37] Defendant states that it would be inequitable to order SportsChannel to enter into a contract with CellularVision when defendant's concerns about signal security have yet to be satisfactorily addressed.[38]

16. Fifth, defendant contends that the Commission's rules permit differences in the terms and conditions of a contract where a complainant and its competitors "are not sufficiently similar."[39] Thus, according to defendant, even if CellularVision could show different treatment, such treatment is justified because CellularVision's competitors (Cablevision and Wireless Cable of New York) are established multichannel videoprogramming distributors ("MVPDs") using established delivery technologies and employing security systems that are more secure than CellularVision's system. On the other hand, according to defendant, CellularVision is a new distributor with whom defendant has never dealt, using a new technology on a trial basis, and employing a signal security system that CellularVision has yet to describe fully or that defendant has yet to understand fully.[40] Defendant states that it has not yet attained the same level of comfort with CellularVision's signal security system as it has with the systems employed by CellularVision's competitors.[41]

17. In its Reply, CellularVision argues that the fact that Prime SportsChannel Network, the defendant named in its initial filing, and SportsChannel Associates, the entity that defendant states controls the SportsChannel programming, are two distinct legal entities is irrelevant and inconsequential to CellularVision's complaint.[42] CellularVision contends that the Complaint properly referenced "SportsChannel" as the underlying defendant.[43] CellularVision further contends that defendant is not harmed by the fact that CellularVision named Prime SportsChannel Network instead of SportsChannel Associates as the corporate entity controlling the programming, in light of the fact that Cablevision, through Rainbow Programming Holdings, Inc., has an attributable interest in both corporate entities.[44]

18. CellularVision further argues that while defendant claims that it has never refused to deal with CellularVision, the Complaint does not allege that defendant has refused to deal. Rather, CellularVision states that the Complaint alleges that defendant unreasonably has refused to sell its programming to CellularVision.[45] CellularVision contends that the Commission's program access rules prohibit discrimination through "unreasonable refusals to sell programming," not unreasonable-refusals to deal.[46]

19. CellularVision states that it has provided defendant with detailed and accurate information concerning its security system, a system with which other independent national programming vendors have expressed their satisfaction.[47] CellularVision states that support from other programming vendors establishes that defendant's asserted lack of comfort with CellularVision's security system is unreasonable.[48] As evidence that defendant's concerns are unreasonable, CellularVision provides an affidavit from Charles F. Newby, Vice President and General Manager of the Broadcast Communications Division at Titan, the company that manufactures the signal security system employed by CellularVision. The Newby affidavit summarizes the attributes of the security system used by CellularVision

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[28] Answer at 3-4.
[29] Answer at 5.
[30] *Id.*; Answer at 18-19. (Defendant states that CellularVision has insisted upon executing a confidentiality agreement as a precondition to further discussion of technical matters. Defendant states that it is seeking to execute such an agreement.)
[31] Answer at 19.
[32] Answer at 19-20.
[33] Answer at 20. While the defendant uses the phrase "refusal to deal," the Commission in the *First Report and Order* discusses "refusals to sell." *First Report and Order*, 8 FCC Rcd at 3412.
[34] Answer at 20-21.
[35] Answer at 21.
[36] Answer at 22.
[37] Answer at 23-25.
[38] Answer at 25.
[39] *Id.*
[40] Answer at 26.
[41] *Id.*
[42] Reply at 4. In its Reply, CellularVision amended the caption in the case to name SportsChannel Associates as the defendant.
[43] Reply at 3.
[44] Reply at 3-4.
[45] Reply at 5.
[46] *Id.*
[47] Reply at 6.
[48] Reply at 7-8.

and compares it to systems used by major U.S. cable and multichannel multipoint distribution service ("MMDS") operators.[49] In his affidavit, Newby states that the Titan system employed by CellularVision compares favorably with security systems used by many major U.S. cable and MMDS operators and with the security systems used by CellularVision's competitors in the Brooklyn area (Cablevision and Wireless Cable of New York) to protect SportsChannel's programming.[50] CellularVision also provides affidavits from programming vendors Encore Media Corporation ("Encore"), Showtime Networks, Inc. ("Showtime"), and Russian-American Broadcasting Company stating their satisfaction with CellularVision's security system.[51]

20. Finally, CellularVision contends that defendant's argument that it may treat CellularVision differently than competing MVPDs because CellularVision is not sufficiently similar to those competing MVPDs essentially amounts to discriminatory treatment for CellularVision's LMDS system.[52] According to CellularVision, defendant's argument that CellularVision's LMDS system warrants more detailed scrutiny than other systems constitutes anti-competitive discrimination.[53]

DISCUSSION

A. *Procedural Issue*

21. As a preliminary matter, we decline to dismiss CellularVision's complaint even though as originally filed it named Prime SportsChannel Network, not SportsChannel Associates, which is the entity that Defendant states controls the programming at issue. We agree with CellularVision that defendant has not been harmed by CellularVision's failure to name SportsChannel Associates as the defendant in CellularVision's initial filing. While CellularVision did name Prime SportsChannel Network as the corporate entity controlling the SportsChannel New York programming in the initial filing, CellularVision also identified in that filing SportsChannel New York as the programming at issue in this case.[54]

B. *Program Access Claim*

22. Congress enacted the program access provisions of the 1992 Cable Act to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive.[55] In enacting the program access provisions, Congress' concern was the market power of wired cable companies.[56] The program access provisions were designed to ensure that competition to cable develops and to encourage nascent competition from emerging competitors.[57] CellularVision's LMDS system is an example of just such an emerging alternative technology.

23. CellularVision's Complaint alleges non-price discrimination by defendant, in violation of Section 628(c)(2)(B) of the Communications Act and Section 1002(b) of the Commission's rules, which prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest in the prices, terms, and conditions of sale of satellite cable programming between competing multichannel video programming distributors. In the *First Report and Order*, the Commission set forth the elements of a non-price discrimination claim under Section 1002(b) of the Commission's rules. The Commission stated that the burden is on the complainant to show that the defendant: (i) is a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets the attribution standards outlined in the Commission's rules; and (ii) the defendant, as between the complainant and another MVPD competitor, has engaged in some form of non-price discrimination, such as an unreasonable refusal to sell its programming to the complainant.[58] To avoid a decision in favor of the complainant, the defendant must establish that it has not engaged in discriminatory behavior because it has refused to sell its programming to the complainant for legitimate business reasons.[59] We find that CellularVision has met its burden in establishing the elements of a non-price discrimination claim, that defendant has not met its burden in establishing that it has refused to sell its programming to CellularVision for legitimate business reasons, and that defendant's other proffered "affirmative defenses" are without merit. Our findings are detailed further below.

24. With respect to the first element, that the defendant must be; a satellite broadcast programming vendor or a satellite cable programming vendor that meets the Commission's attribution standards, a satellite cable programming vendor is defined in the 1992 Cable Act as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming."[60] Defendant admits that SportsChannel Associates "is engaged in the business of producing and distributing to multichannel video programming distributors a wide range of sports programming."[61] Thus, we find that SportsChannel Associates is a satellite cable programming vendor under Section 76.1002(b) of the Commission's rules.

25. As for the Commission's attribution standards, under Sections 76.1000(b) and 76.501 of the Commission's rules, a cable operator will be considered to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting.[62] Defendant admits that Cablevision, a cable system operator, holds an attributable interest in SportsChannel Associates as defined by the Commission's rules.[63] Thus, we find that SportsChannel Associates is a vertically integrated programming vendor under Sections 76.1000(b) and 76.501 of the Commission's rules.

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[49] *See* Reply, Exhibit A, Affidavit of Charles F. Newby ("Newby Affidavit").
[50] Newby Affidavit at 4.
[51] *See* Reply, Exhibit B, Exhibit C and Exhibit D.
[52] Reply at 11.
[53] *Id.*
[54] *See* Complaint at 2.
[55] 1992 Cable Act, Section 2(b)(2).
[56] 1992 Cable Act, Sections 2(a)(2) and 2(b)(5).
[57] H.R. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992) ("the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable").
[58] *First Report and Order*, 8 FCC Rcd at 3422.
[59] *Id.*
[60] 1992 Cable Act § 628(i)(2).
[61] Answer at 2.
[62] *See* 47 C.F.R. §76.1000(b); *First Report and Order*, 8 FCC Rcd at 3370.
[63] Answer at 27.

26. With respect to the element of discrimination vis-a-vis CellularVision and a competitor, the Commission has stated that in order to establish that another distributor is a competitor for purposes of showing discrimination under Section 1002(b), there must be "some overlap in actual or proposed service area."[64] CellularVision, through its managing partner, Hye Crest Management, Inc., has been licensed by the Commission to construct an LMDS system in the Brighton Beach, Brooklyn area of the New York PMSA.[65] CellularVision states that "[t]wo of CellularVision's competitors in Brooklyn, franchised cable operator Cablevision, and wireless cable operator Wireless Cable of New York," each are licensed to offer SportsChannel programming.[66] Defendant admits that Cablevision and Wireless Cable of New York are licensed to offer SportsChannel programming.[67] We therefore find that defendant sells its SportsChannel New York programming to CellularVision's competitors.

27. With respect to the requirement that CellularVision show the existence of non-price discrimination by defendant, the Commission has recognized that an "unreasonable refusal to sell" may constitute non-price discrimination under Section 628(c)(2)(B).[68] However, in the *First Report and Order*, the Commission cautioned that unreasonable refusals to sell must be distinguished from refusals to sell based on legitimate reasons.[69] Defendant admits that it has not yet provided the SportsChannel programming to CellularVision,[70] but contends that its refusal to sell to CellularVision is based on legitimate concerns about CellularVision's signal security system.[71] Based on the facts in the record, we are persuaded by CellularVision's claim that defendant unreasonably has refused to sell its SportsChannel programming to CellularVision. In addition, we are not persuaded by defendant that its stated concern that it has not received adequate assurances about CellularVision's signal security system serves as a legitimate basis for refusing to sell the SportsChannel programming to CellularVision.[72] We therefore find that defendant's refusal to sell its SportsChannel programming to CellularVision constitutes an unreasonable refusal to sell.

28. We agree with defendant that it is reasonable to demand adequate assurances that CellularVision's signal security system will protect the SportsChannel programming. However, we are not persuaded by the evidence presented that defendant has a basis for its continued objections. Specifically, defendant raises three concerns that it contends have not been addressed adequately by CellularVision.[73] First, Idefendant states that CellularVision "for months" declined to specify the type of decoder used with its encoding equipment.[74] Defendant states that an understanding of the decoding equipment to be used is "absolutely essential to any reasonable assessment of [CellularVision's] system," and that CellularVision's responses have not provided an adequate description of that equipment.[75] Second, defendant argues that CellularVision's responses were inaccurate in that they did not properly identify the encoding device to be used. Defendant states that CellularVision had represented that it was using the Jerrold Modulating Video Processor ("MVP II") device, but that a Titan representative informed defendant for the first time in a February 14, 1995 letter that CellularVision was using the Samsung/Titan VideoPassport Conditional Access System ("VideoPassport") device.[76] Defendant states that it has not received any clarification of this apparent discrepancy.[77] Third, defendant claims that CellularVision represented that the audio portion of the signal would be protected by the security system, when it in fact is not. Defendant states that during a phone conversation with a Titan representative, it "learned that the audio portion of the signal was not protected at all."[78]

29. With respect to defendant's concern that it has not received an adequate description of the descrambling (or decoder) equipment to be used, we are persuaded by the evidence presented that CellularVision has provided defendant with the information it has requested. We therefore

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[64] *First Report and Order*, 8 FCC Rcd at 3400.

[65] *See Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991).

[66] Complaint at 3.

[67] Answer at 28.

[68] *First Report and Order*, 8 FCC Rcd at 3412.

[69] *Id.*

[70] Answer at 27.

[71] See *supra*, ¶11 and ¶15.

[72] We note that defendant's Answer discusses areas of inquiry other than signal security where CellularVision allegedly has not provided adequate responses. *See, e.g.*, Answer at 3 ("SportsChannel has sought to obtain basic information regarding the nature of CellularVision's service, its subscriber projections, channel line-ups, marketing and packaging plans, and signal security"); Answer at 22-23 ("the chief obstacle to the consummation of an agreement has been CellularVision's incomplete, inaccurate, and inadequate responses to requests for information about signal security, channel line-up, roll-out schedule, and marketing"). Nonetheless, defendant focuses on the signal security issue as the primary grounds for its refusal to enter into a contract with CellularVision. *See, e.g.*, Answer at 2 ("The instant dispute represents an improper attempt by CellularVision . . . to use the Commission's Program Access Rules . . . to coercively obtain a programming license without providing SportsChannel necessary and satisfactory information or assurances on a number of elemental issues, particularly signal security"). Moreover, we find that CellularVision responded to defendant's inquiries on issues other than signal security in a January 5, 1995 letter to defendant in which CellularVision provided information concerning its ownership structure, rollout plan, marketing plan, and other programming services to be offered. *See* Complaint, Exhibit 16 (January 6, 1995 letter from John J. Prisco to James M. Bates). Thus, to the extent defendant relies on the fact that CellularVision has not provided adequate responses with respect to these other areas as justification for its refusal to sell SportsChannel programming to CellularVision, we are not persuaded that such grounds constitute a legitimate business reason for refusing to sell the programming.

[73] In its Answer, defendant catalogues the correspondence between the parties and describes what it contends are inadequacies in CellularVision's responses to its inquiries. Answer at 7-19. These three concerns were specifically identified by defendant in its Answer as areas where it has yet to receive adequate assurances from CellularVision. Answer at 4- 5.

[74] Answer at 5. A signal security system of the type used by CellularVision generally is comprised of an encoding device that scrambles the signal at its source and a decoding device that converts the signal to a usable form at or near the subscriber's home.

[75] Answer, Exhibit 1, Affidavit of Peter D. Lubell ("Lubell Affidavit") at ¶12.

[76] Answer at 18; Lubell Affidavit at ¶19.

[77] Lubell Affidavit at ¶20 .

[78] Lubell Affidavit at ¶19 . Defendant further states generally that CellularVision "has suggested" that its signal security is more advanced than it actually is. Answer at 5.

find that defendant has not shown that its stated concern constitutes a legitimate business reason for refusing to sell the SportsChannel programming to CellularVision. In addition to providing defendant an opportunity to view the security system in operation at CellularVision's Brighton Beach facility,[79] CellularVision provided defendant an opportunity to talk with a representative of Titan, Charles F. Newby, about the system. Newby, in an affidavit, states that during a February 14, 1995 telephone conversation with Peter D. Lubell, Director of Affiliate Engineering and Signal Integrity at Rainbow Network Communications,[80] he described to Mr. Lubell "the specific measures that the Samsung/Titan set-top decoder [the decoder used by CellularVision] employs against the would-be pirate," and "the specific construction and operation of the Entitlement Management and Entitlement Control Messages that must be received by an individual set-top decoder before it will decode the video and enable audio portions of the television signal."[81] Further, in a letter dated February 14, 1995, Newby provided Lubell a detailed description of the various elements of the security system, including the descrambling technology to be used.[82] Significantly, while defendant argues that CellularVision's descriptions of its decoding technology in correspondence between John J. Prisco, President of CellularVision, and James M. Bates, General Manager of SportsChannel[83] were not sufficiently detailed[84] , it is silent on the sufficiency of the description provided by Newby in the February 14, 1994 letter and telephone conversation.[85]

30. We also are not persuaded by defendant that its stated concern about the supposed discrepancy between CellularVision and Titan as to the type of encoding device employed by CellularVision constitutes a legitimate business reason for refusing to sell SportsChannel programming to CellularVision. Defendant states that Lubell learned for the first time that CellularVision was using the VideoPassport device rather than the MVP-II device from Newby during the February 14, 1994 telephone conversation between Lubell and Newby.[86] CellularVision responds that it consistently disclosed to defendant that it was in the process of evaluating both the Samsung/Titan and General Instruments systems, and that when it chose the Samsung/Titan system, defendant was provided an opportunity to view the system in operation during the February 14, 1995 demonstration at CellularVision's facilities and was provided a detailed description of the system in conversations and correspondence with Newby.[87] In light of the fact that CellularVision disclosed to defendant that it was 0 evaluating different systems[88] and that defendant has been provided with a detailed description of the system chosen by CellularVision and a demonstration of the system in operation, we are not persuaded by defendant that its stated concern about the supposed discrepancy is a legitimate business reason for refusing to sell SportsChannel programming to CellularVision.[89]

31. Finally, we are not persuaded that defendant's objection that CellularVision misrepresented whether the audio portion of the signal will be protected constitutes a legitimate business reason for refusing to sell to CellularVision. Defendant states that in a conversation with Lubell, Newby "confirmed that CellularVision did not secure the audio portion of its signal."[90] Newby replies that "[a]t no time" during any conversation with Lubell "have I ever stated the audio portion of the signal is not protected.'"[91] Newby states that, to the contrary, he described to Lubell the capabilities of the Video PassPort system, which include the ability to "encrypt the CD-quality stereo digital audio channels transmitted in the horizontal blanking interval."[92] Newby states that he further informed Lubell that CellularVision initially would operate its system using synchronization pulse elimination and video inversion while transmitting the audio via dual subcarriers via a narrow band frequency modulated intermediate frequency carrier in the 28 GHz band. Newby also informed Lubell 80 \that the frequency modulated video and dual audio subcarrier signal transmission format used by CellularVision cannot be processed by television receivers until it is converted to an amplitude modulated signal by a properly authorized Samsung/Titan set-top decoder.[93] We conclude, based on the information in the Newby Affidavit, that Lubell received a detailed description from Newby of the capabilities of the Video PassPort system to protect the audio portion of signals and of the technology currently employed by CellularVision to protect the audio portion. We therefore

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[79] A demonstration of CellularVision's security system was held at CellularVision's Brighton Beach facility on February 14, 1995. *See* Complaint at 7-8; Answer at 16-18.

[80] Rainbow Programming Holdings, Inc. owns a 50% interest in SportsChannel Associates, the partnership that owns SportsChannel New York. *See* Answer at 2.

[81] Newby Affidavit at ¶ 8.

[82] Complaint, Exhibit 20 (February 14, 1995 letter from Charles F. Newby to Peter Lubell). In the letter, Newby provides the following description of the set-top decoder: "[t]he decoder interface is via an L-band input, is subscription and pay-per-view addressable with 22 tier bits, uses horizontal and vertical synchronization pulse suppression, video inversion and audio transmitted on dual sub-carriers." In addition, Newby provided in the letter a description of how the set-top decoder receives and decodes messages.

[83] *See* Answer, Exhibit 7 (October 13, 1994 letter from Prisco to Bates); Answer, Exhibit 11 (December 9, 1994 letter from Prisco to Bates); Answer, Exhibit 14 (January 5, 1995 letter from Prisco to Bates).

[84] The Lubell Affidavit states that "John Prisco's correspondence with James Bates did not provide me with enough information to evaluate CellularVision's signal security." Lubell Affidavit at ¶ 6.

[85] In fact, defendant's only comment on the extensive information presented in Newby's February 14, 1994 letter is that it clarifies that CellularVision will use the VideoPassport device, rather than the MVP-II that defendant states CellularVision had represented would be used. *See* Lubell Affidavit at ¶19.

[86] Lubell Affidavit at ¶19.

[87] Reply at 6-7, n.4.

[88] *See, e.g.,* Answer, Exhibit 9 (October 13, 1994 letter from Prisco to Bates) (In response to the question "[w]hat type of equipment will be employed?", CellularVision responded "General Instruments and Samsung - to be determined").

[89] It is our understanding that the VideoPassport security system described by Newby in his February 14, 1995 letter to Lubell and in the Newby Affidavit currently is employed by CellularVision on its Brighton Beach system and will be employed by CellularVision on systems in other locations within its authorized service area. *See, e.g.,* Newby Affidavit at ¶ 3 (CellularVision "recently agreed to purchase a system that uses Samsung Equipment and Titan conditional access technology"). Our finding here is based on this understanding.

[90] Answer at 17-18.

[91] Newby Affidavit at ¶ 7.

[92] *Id.*

[93] *Id.*

are not persuaded by defendant that its stated concern that CellularVision has misrepresented whether the audio portion of the signal will be protected constitutes a legitimate business reason for its refusal to sell programming to CellularVision.

32. While not determinative, our conclusions with respect to the legitimacy of defendant's concerns about CellularVision's security system are buttressed by the fact that other satellite cable programming vendors have expressed their satisfaction with CellularVision's signal security system. CellularVision submits affidavits from Encore, Showtime, and Russian American Broadcasting Company, L.P. expressing satisfaction with CellularVision's signal security system. Encore states that it provides its services "to over 1125 cable systems and alternative providers, including but not limited to MMDS and MDS technologies," and that it "believe[s] CellularVision of New York's scrambling method to be as good, if not better than all of our other affiliates, including but not limited to cable and MMDS/MDS operators."[94] Showtime states that its programming services are distributed "by several technologies such as, but not limited to Cable, DBS, MMDS, MDS and SMATV," and that CellularVision meets all of Showtime's guidelines for signal security.[95]

33. We further find that the other "affirmative defenses" raised by defendant are without merit. With respect to the defense that the complaint fails to offer any evidence that defendant has "refused to deal" with CellularVision and that in fact the record is replete with evidence of defendant's willingness to negotiate, we find that defendant's argument is overly simplistic. As CellularVision points out, the complaint alleges that defendant unreasonably has refused to sell its programming to CellularVision, not that defendant has refused to deal with CellularVision. While we agree with defendant that the record shows a course of communications between the parties, the fact that defendant has engaged in communications does not preclude a finding that defendant unreasonably has refused to sell its programming.

34. We also reject the defense that even if it could be shown that defendant "refused to deal" with CellularVision, such refusal was not unreasonable because defendant has acted reasonably throughout the negotiation process and CellularVision has acted unreasonably by resisting defendant's efforts to obtain information. As discussed above,[96] while we agree that it is reasonable for defendant to demand adequate assurances that CellularVision's signal security system will protect the SportsChannel programming, we also find that CellularVision has provided such assurances. We thus find that defendant's continued objections do not constitute a legitimate basis for refusing to sell the SportsChannel programming to CellularVision.

35. Finally, we reject the defense that even if CellularVision can show that it has received different treatment from its competitors, such treatment is justified because CellularVision is not "sufficiently similar" to its competitors. Defendant supports this defense by asserting that it has not attained the same level of comfort with CellularVision's signal security system that it has attained with the systems of CellularVision's competitors. As stated above,[97] however, we are not persuaded by defendant that its stated concerns about CellularVision's signal security system constitute a legitimate basis for refusing to sell SportsChannel programming to CellularVision. Therefore, we find this defense to be without merit.

C. *Conclusion*

36. We find that defendant unreasonably has refused to sell its SportsChannel New York programming to CellularVision. We find that, based on the facts, and assuming that the VideoPassport signal security system described by Newby in his February 14, 1995 letter to Lubell and in the Newby Affidavit currently is employed by CellularVision on its Brighton Beach system and will be employed by CellularVision on systems in other locations within its authorized service area, defendant has not persuaded us that its stated concerns with respect to the integrity of CellularVision's signal security system constitute a legitimate business reason for refusing to sell SportsChannel programming to CellularVision.[98] In addition, given our findings with respect to defendant's concerns, we reject the other defenses proffered by defendant. We hereby order SportsChannel Associates to sell its SportsChannel New York programming to CellularVision for distribution on CellularVision's LMDS system in Brighton Beach, Brooklyn, and in all locations within CellularVision's authorized service area, the New York PMSA. We decline to impose sanctions against defendant at this time.

ORDERING CLAUSES

37. Accordingly, SportsChannel Associates is hereby ORDERED to sell its SportsChannel New York programming to CellularVision on non-discriminatory terms within 45 days from the release date of this order for distribution by CellularVision on its LMDS video distribution system in Brighton Beach, Brooklyn and at all locations within CellularVision's authorized service area, the New York PMSA, in accordance with this Memorandum Opinion and Order.

38. This action it taken pursuant to authority delegated by Section 0.321 of the Commission's rules.[99]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[94] Reply, Exhibit B.
[95] Reply, Exhibit C.
[96] *See supra*, ¶ ¶ 27-31.
[97] *Id.*
[98] *See supra*, n.83.
[99] 47 C.F.R. § 0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 16, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to permit FM Channel and Class Modifications [Upgrades] by Application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended, for those communities.

2. This action constitutes an editorial change in the Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Juneau, Alaska	264C2	264A
Paris, Arkansas	237A	237C2
Fortuna, California	262C3	262C1
Pacific Grove, California	286B1	286A
Denver, Colorado	258C1	258C
Apalachicola, Florida	265A	263C3
Jupiter, Florida	288A	288C3
St. Augustine Beach, Florida	288A	288C3
Smithville, Georgia	295A	293A
East St. Louis, Illinois	266B	266C2
Fairbury, Illinois	299A	299B1
Kingman, Kansas	232A	232C2
Dennysville, Maine	275A	275C1
Mackinaw City, Michigan	232A	233C3
Brainerd, Minnesota	278A	278C3
Duluth, Minnesota	269A	269C3
Proctor, Minnesota	299A	299C2
Ash Grove, Missouri	281A	281C3
Aurora, Nebraska	247C2	247C1
Gering, Nebraska	280C	280C1
Bishop, Texas	296A	295C3
Provo, Utah	241C	242C

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-67

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Greenfield and Stockton, Missouri)	RM-8624

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 16, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. In response to a petition filed by KYOO Communications ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 5481 (1995), proposing the allotment of Channel 299A to Stockton, Missouri, as that community's first local FM broadcast service. The *Notice* specified that to accommodate petitioner's proposal, it would be necessary to delete vacant Channel 299A at Greenfield, Missouri.[1] Petitioner filed comments in support of its proposal. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 299A at Stockton, Missouri, since it will provide the community with its first local FM broadcast service. Channel 299A can be allotted to Stockton, Missouri, in compliance with the Commission's spacing requirements provided there is a site restriction 8.5 kilometers (5.3 miles) west of the community.[2] The site restriction will prevent a short spacing to Station KCLQ, Channel 300C2, Lebanon, Missouri. Since no comments were filed in response to the *Notice* supporting retention of a channel in Greenfield, we shall delete Channel 299A at Greenfield.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Greenfield, Missouri	—
Stockton, Missouri	299A

4. The window period for filing applications for Channel 299A at Stockton, Missouri, will open on **October 10, 1995**, and close on **November 13, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* indicated that Channel 265A could be considered as a substitute channel at Greenfield, Missouri, should interest be expressed in retention of a channel in the community, as it is Commission policy not to delete a channel in which interest has been expressed.

[2] The coordinates for Channel 288A at Stockton are 37-42-22 and 93-53-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-65

In the Matter of

Amendment of Section 73.202(b),	RM-8595
Table of Allotments,	
FM Broadcast Stations.	
(Billings, Montana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 16, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 5152 (1995), proposing the allotment of Channel 242C1 to Billings, Montana. The *Notice* was issued in response to a petition filed by Conway Broadcasting ("petitioner"). Petitioner filed comments reiterating its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by allotting Channel 242C1 to Billings, Montana, since it will provide the community with additional broadcast service. As indicated in the *Notice*, Channel 242C1 can be allotted to Billings in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Billings, Montana	227C1, 231C, 242C1, 246C1, 253C1, 275C1, 279C1, 286A, 298C[2]

4. The window period for filing applications for Channel 242C1 will open on **October 10, 1995**, and close on **November 13, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 242C1 at Billings are 45-46-58 and 108-30-13.

[2] The *Report and Order* in MM Docket 95-36, released July 19, 1995, allotted Channel 298C to Billings. We note that Conway Broadcasting was the petitioner in that proceeding. As a precautionary matter, in *Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3914 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991), the Commission held: A statement of interest in operating a station made by a party, who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the Rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act [of 1934, as amended], forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-62

In the Matter of

Amendment of Section 73.202(b),	RM-8444
Table of Allotments,	RM-8512
FM Broadcast Stations.	
(Kasilof and Anchorage, Alaska)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 3047 (1994), issued in response to a petition filed on behalf of William Glynn ("petitioner") proposing the allotment of FM Channel 229A to Kasilof, Alaska, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. Christian Broadcasting, Inc. ("CBI")[2] filed a counterproposal.[3] Petitioner and CBI each filed reply comments. Petitioner also filed supplemental comments.[4]

2. CBI counterproposed the allotment of Channel 229C2 to Anchorage. In support of its proposal CBI urges that Channel 229C2 is the only channel available to provide Anchorage with a new FM service consistent with the technical requirements of Sections 73.207(b)(2) and 73.315 of the Commission's Rules, and suggested that compliance could be attained at a restricted site located 18 kilometers (11 miles) southeast of the community at coordinates 61-04-02 and 149-44-36.[5] However, in an effort to accommodate the petitioner's desire to provide a first local aural transmission service to Kasilof, CBI suggests that Channel 233A can be allotted to that community without a site restriction. In this manner, CBI urges that the goals of Section 307(b) of the Communications Act of 1934, as amended, would be advanced by providing a new broadcast service to each community.

3. Petitioner objects to CBI's proposed option to allot Channel 233A to Kasilof, since its use would be limited by first adjacent Channel 232A at Houston, Alaska, thereby effectively foreclosing either community from future expansion of service. Therefore, petitioner suggests consideration of Channel 289A or Channel 295A instead, and commits to apply for a license on either channel.[6]

4. Based upon the information presented, we will allot Channel 295A to Kasilof, Alaska, as that community's first local aural transmission service. Additionally, in response to the counterproposal presented by CBI, we will allot Channel 229C2 to Anchorage, Alaska, to provide an additional FM service at that community. Channel 295A can be allotted to Kasilof without the imposition of a site restriction at coordinates 60-20-15 and 151-16-20. Additionally, Channel 229C2 can be allotted to Anchorage consistent with the minimum distance separation requirements of Section 73.207(b)(2) of the Commission's Rules, provided the transmitter therefor is sited at least 18 kilometers (11 miles) southeast of the community at coordinates 61-04-02 and 149-44-36.[7] [8] Moreover, potential applicants for Channel 229C2 are advised of the necessity to conform their applications with the technical requirements of Section 73.1030(c)(1)-(5) of the Commission's Rules regarding protection to the Commission's monitoring station at Anchorage, Alaska.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections

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[1] The community of Anchorage, Alaska, has been added to the caption.

[2] CBI is the licensee of noncommercial educational Station KATB(FM), Channel 207C3, Anchorage.

[3] Public Notice of the counterproposal was given on September 7, 1994, Report No. 2028, and corrected on September 27, 1994.

[4] These comments were filed after the record closed and were not accompanied by a motion to accept. However, they have been accepted for consideration herein since they provide the Commission with information regarding another available channel at Kasilof to satisfy the petitioner's desire to provide a first local aural service to that community.

[5] Petitioner advises that the referenced coordinates define the licensed site of Station KATB(FM).

[6] Although petitioner initially suggested consideration of Channel 290A for allotment to Kasilof instead of Channel 233A, he asserts that he was unaware of its allotment at Seward, Alaska, which would preclude future expansion on that frequency at either community. Therefore, petitioner asserts that the basis of the proposal contained in his reply comments has been fundamentally altered. Consequently, petitioner requests consideration of either Channel 289A or Channel 295A for allotment to Kasilof to accommodate his desire to provide a first local aural transmission service to that community. We have selected Channel 295A for consideration since it will afford maximum use of the frequency at Kasilof.

[7] As indicated in footnote 5, *supra*, the reference coordinates specified herein denote the site of noncommercial educational Station KTAB(FM). However, as the addition of a new channel at a community requires that the allotment be made available for competing applications, CBI will have no greater rights to apply for Channel 229C2 than other potential applicants. Moreover, CBI advises that sufficient area is available within the referenced area for the selection of a transmitter site from which compliance with the technical requirements of the Commission's Rules may be accommodated.

[8] We recognize that the proposed allotment of Channel 229C2 at Anchorage is 25.6 kilometers (16 miles) short-spaced to the site specified in the one-step application of Station KADX(FM), for Channel 232C2, Houston, Alaska, (File No. BMPH-941000710), specifying coordinates 61-20-10 and 149-30-43. However, as the referenced application was filed after the deadline established for filing counterproposals in this proceeding, it must be considered a site preference only. *See Andalusia, Alabama*, 49 FR 32201 (1984). *See also FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993) at para. 18; *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. granted in part*, 8 FCC Rcd 4743 (1993). A copy of this *Report and Order* will be served on the permittee of Station KADX(FM).

0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the communities listed below, as follows:

City	Channel No.
Anchorage, Alaska	225C, 229C2, 247C1, 251C1, 255C1, 263C3, 267C2, 271C3, 276C2, 281C1, 287C1, 293C, 298C1
Kasilof, Alaska	295A

6. The window period for filing applications for Channel 229C2 at Anchorage, Alaska, and for Channel 295A at Kasilof, Alaska, will open on **October 10, 1995** and close on **November 13, 1995**.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested to the permittee of Station KADX(FM), Houston, Alaska, as follows:

Chester P. Coleman
1255 Post Street
Suite 625
San Francisco, CA 94109

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 229C2 at Anchorage, Alaska, and for Channel 295A at Kasilof, Alaska, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-63

In the Matter of

Amendment of Section 73.202(b),	RM-8450
Table of Allotments,	RM-8526
FM Broadcast Stations.	
(Rocky Mount, Bassett and Stanleytown, Virginia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1995; Released: August 25, 1995

By the Chief, Allocations Branch:

1. At the request of WNLB Radio, Inc. ("petitioner"), licensee of Station WZBB(FM), Channel 260A, Rocky Mount, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3044 (1994). The *Notice* proposed the substitution of Channel 260C3 for Channel 260A, the reallotment of Channel 260C3 from Rocky Mount to Bassett, Virginia, and the modification of petitioner's license to specify Bassett as Station WZBB(FM)'s community of license. Comments were filed by Edward A. Baker d/b/a Radio 900, licensee of Station WCBX(AM), Bassett, Virginia, ("Baker") and petitioner.[2] Baker filed reply comments. Petitioner filed a counterproposal.[3] Petitioner and Baker filed reply comments. Baker filed a motion to strike part of petitioner's reply comments and petitioner filed an opposition to the motion to strike.[4]

2. Petitioner reiterates its intention to apply for Channel 260C3, if allotted to Bassett. In support of its proposal, petitioner notes that the estimated area which will lose existing service would comprise about 10% of Station WZBB(FM)'s present coverage, while the estimated gain area would more than double the existing service provided by the station. According to petitioner, adoption of its proposal would provide a first local full-time service to Patrick County, which presently is served only by daytime AM station WHEO and would also provide a second nighttime service to much of Henry County. In response to those concerns stated in the *Notice* questioning whether petitioner's proposal to add a service to the community of Bassett would result in a preferential arrangement of allotments,[5] petitioner counterproposed the reallotment of Channel 260C3 to Stanleytown, Virginia, in lieu of its consideration at Bassett. Petitioner states that Stanleytown is a Census Designated Place ("CDP") located adjacent to Bassett. It is a community quite comparable to Bassett, both in terms of population and community attributes. Petitioner states that should the Commission determine that the public interest would be better served by adoption of its counterproposal, it will apply for Channel 260C3, if allotted to Stanleytown.

3. Baker filed comments objecting to the requested reallotment, noting that petitioner would not be providing a first local service to Bassett, since Station WODY(AM) is licensed to serve Bassett and has been operating for approximately 34 years. Baker argues that adoption of petitioner's proposal would deprive Rocky Mount of its only local FM service. In addition, Baker contends that the gain area proposed by petitioner is approximately 40 percent less than that projected by petitioner. Removal of WZBB(FM) from Rocky Mount would result in 2049 potential local listeners per each of the remaining Rocky Mount stations while adoption of the reallotment would result in 790 persons per station at Bassett, a service discrepancy, that Baker contends would enrich petitioner as owner of one of the remaining Rocky Mount stations, while resulting in serious financial distress to WCBX(AM) in Bassett. With regard to petitioner's counterproposal, Baker states petitioner has failed to provide demographic data that would enable the Commission to determine whether or not the public interest would be serve by moving an established station from a large community to the "hamlet of Stanleytown". Finally, Baker argues that the possibility of petitioner securing a fully spaced site is nil. Baker submits that where a fully spaced site must be located lies wholly within the Philpott Lake-Fairy Stone Park area and is administered by the U.S. Army Corp of Engineers, the Virginia Commission on Game and Inland Fisheries, and the Franklin County Director of Planning and Zoning. Baker argues that the likelihood of petitioner securing authority from all of these agencies to erect a commercial radio station in the Philpott Lake, Fairy Stone Park area is virtually zero. Baker submits that absent a showing that a site is available for the proposed move, the Commission will be wasting its time and funds in adopting petitioner's proposal.

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[1] The community of Stanleytown has been added to the caption.

[2] Petitioner also filed a letter stating that it had attempted to serve the Pyramid Communications, licensee of Station WRFX(FM), Kannapolis, North Carolina, with a copy of its comments and counterproposal, however, its correspondence was returned with no forwarding address provided.

[3] Public Notice of the filing of the counterproposal was given September 26, 1994, Report No. 2031. We note the Commission inadvertently placed the counterproposal on public notice again October 31, 1994, however, by notice dated November 3, 1994, the Commission deleted the later notification.

[4] In response to the Public Notice announcing acceptance of petitioner's counterproposal, petitioner filed reply comments. Baker filed a motion to strike directed to these reply comments. Baker argues in its Motion that petitioner's reply comments go beyond the counterproposal and address issues raised in the *Notice of Proposed Rule Making* and earlier comments. We will deny to the motion to strike because we find that the reply comments are generally addressing the Stanleytown counterproposal and engineering issues which apply to the Stanleytown counterproposal also apply to the Bassett proposal since the same transmitter site is proposed for both.

[5] The *Notice* questioned whether adoption of petitioner's proposal to bring a second aural transmission service to Bassett would advance the Commission's preferential arrangement of allotments pursuant to the Commission's change of community procedure. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

4. In rebuttal, petitioner supports both the initial proposal to allot Channel 260C3 to Bassett, and the counterproposal to allot Channel 260C3 to Stanleytown. As a preliminary matter, petitioner provided evidence that a suitable privately-owned parcel of property has been located and is available.[6] Petitioner further submits that at its new proposed site[7] there would be a gain of 2,176 sq. km. and 80,903 people, a loss of 323 sq. km. and 6,119 people, yielding a net gain of 1,853 sq. km. and 74,784 people. In this regard, petitioner states that the net gain represents 75.4% of the area and 88.5% of the population presently served by Station WZBB(FM). With respect to Baker's characterization of Stanleytown as a "hamlet", petitioner comments that the community is a CDP which obviates the need for the types of arguments concerning licensable status which Baker has attempted to raise, citing, *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). Nevertheless, petitioner submits that Stanleytown contains five churches, an elementary school, a private academy for grades 1-12, a health care center, a Ruritan club (which also provides refuse collection services to the town), a country club, post office, a major car dealership, three physicians, a nursing home, and approximately 25 other businesses. Stanleytown's major business is Stanley Furniture which employs about 2000 persons. Petitioner notes that communities the size of Stanleytown intentionally do not incorporate so as to benefit from county services, all of which are furnished to similar communities such as Bassett.

5. To begin with, we will address Baker's assertion that Stanleytown is not a community.[8] Stanleytown is a CDP as defined by the U.S. Census. The designation of an area as a CDP raises the presumption that an area is a community for allotment purposes, although that presumption is rebuttable and Baker has in this case.[9] Even so, petitioner states that Baker's information is false. Baker asserts that Stanleytown has no civic clubs, whereas petitioner argues that there is a Ruritan club and a country club. Baker claims there are no physicians, high or middle schools, hospital or garbage service. On the other hand, petitioner states that the Ruritan club provides garbage service and there are three physicians practicing in Stanleytown. Petitioner further states there is an elementary school, a private academy, a health care center and a nursing home. While it appears Stanleytown is a small community (population 1,563),[10] the community has a major employer (Stanley Furniture), churches, health facilities, civic and social clubs and a U.S. Post Office. We find that, contrary to Baker's beliefs, that Stanleytown is a community for allotment purposes.

6. Having found Stanleytown to be a community for allotment purposes, we must evaluate the comparative merits of retaining Channel 260A at Rocky Mount versus substituting 260C3 and reallotting the channel to either Bassett or Stanleytown. We believe the public interest would be served by the substitution of Channel 260A for Channel 260C3, and its reallotment to Stanleytown, since it would provide the community with its first local aural transmission service and enable Station WZBB(FM) to upgrade its facilities.[11] Specifically, the reallotment would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures.[12] Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities as set forth in *Revision of FM Assignment Policies and Procedures, supra*.[13]

7. In making our determination, we find that under priority three, Stanleytown would receive a first local transmission service. Basset already has an AM local transmission service and, thus falls under priority four. Furthermore, the reallotment will not remove the sole local transmission service from Rocky Mount, since AM stations WNLB and WYTI will remain licensed to the community. In addition, our engineering analysis indicates that the upgrade and reallotment to Stanleytown will enable Station WZBB(FM) to provide service to a gain area of 2,228 square kilometers with a population of 77,405 persons. We recognize that the removal of Station WZBB(FM) from Rocky Mount will create a reception service loss area of 124 square kilometers with a population of 2,208 persons. However, our concerns about this loss area are mitigated by the fact that all of the population located in this loss area will continue to receive at least five full-time aural reception services.

8. An engineering analysis has determined that Channel 260C3 can be allotted to Stanleytown in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.8 kilometers (18.0 miles)

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[6] Petitioner has included as part of its evidence, a letter from Melvin L. Clark, Jr., a member of the Franklin County Planning Commission. The letter states that there are no zoning restrictions as they relate to the construction of a broadcast tower at petitioner's proposed site.

[7] Petitioner also states that the areas and populations which would receive or lose service would be identical under either the initial proposal for reallotment to Bassett or the counterproposal for reallotment to Stanleytown since the same hypothetical site will provide city grade coverage to both communities.

[8] We also note that Baker has challenged the availability of a theoretical site for the proposed channel allotment. While Baker contends that petitioner may not be able to obtain approval to erect a commercial radio station tower within the fully spaced area, we believe that this argument is speculative. There is no documentation from zoning officials to support this assertion. On the other hand, petitioner has presented evidence indicating the availability of a privately-owned parcel of property that would be suitable for its proposed transmitter site. Moreover, the question of whether a specific site is legally available and suitable is a matter to be more appropriately considered in connection with an application for a construction permit for use of a channel. *See Pinckneyville, Illinois*, 30 R.R. 2d 1344, 1347 (1974) and *Key West, Florida*, 3 FCC Rcd 6423 (1988). In this case, we know that a fully spaced area exists to locate a transmitter site, and Baker has not shown that zoning problems would prevent locating an FM tower anywhere within the area specified by petitioner.

[9] *See e.g.,, East Hemet, California, et. al.*, 4 FCC Rcd 7895 (1989); *Hannahs Mill, and Millegeville, Georgia*, 7 FCC Rcd 3944 (1992).

[10] Population figures are taken from the 1990 U.S. Census.

[11] Station WZBB(FM) is prohibited from upgrading its facilities at Rocky Mount due to short-spacing conflicts with Station WFXQ(FM), Channel 260C3, Chase City, Virginia, and Station WVAF(FM), Channel 260B, Charlestown, West Virginia.

[12] *See Modification of License MO&O, supra*.

[13] The allotment priorities are as follows: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. The provision of second aural service and first local service are treated co-equally.

northwest to accommodate petitioner's desired site.[14] In accordance with Section 1,420(i) of the Commission's Rules, we will modify Station WZBB(FM)'s license to specify operation on 260C3 at Stanleytown in lieu of Channel 260A at Rocky Mount, Virginia.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Rocky Mount, Virginia	–
Stanleytown, Virginia	260C3

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license for Station WZBB(FM), IS MODIFIED to specify Stanleytown, Virginia, as its community of license on Channel 260C3, in lieu of Channel 260A at Rocky Mount, Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, WNLB Radio, Inc., licensee of Station WZBB(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license.

12. Accordingly, IT IS FURTHER ORDERED, That the petition for rule making submitted by WNLB Radio, Inc., to substitute Channel 260C3 for Channel 260A and reallot Channel 260C3 to Bassett, Virginia (RM-8450), IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[14] The coordinates for Channel 260C3 at Stanleytown are North Latitude 36-48-47 and West Longitude 80-04-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-135

In the Matter of

Amendment of Section 73.202(b), RM-8681
Table of Allotments,
FM Broadcast Stations.
(Honor, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 16, 1995; Released: August 28, 1995

Comment Date: October 19, 1995
Reply Comment Date: November 3, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Jacqueline F. Bourgard ("petitioner"), requesting the allotment of Channel 264A to Honor, Michigan, as that community's first local broadcast service. Petitioner submitted an engineering analysis in support of the proposal and states her intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local service to Honor, Michigan. A staff engineering analysis indicates Channel 264A can be allotted to Honor consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 3 kilometers (1.8 miles) north of the community.[1] The site restriction will prevent a short spacing to Station WZTU, Channel 261A, Bear Lake, Michigan. Since the community of Honor is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence will be requested for this allotment.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several states and communities." The Commission has defined "communities" as geographically identifiable population groups. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community facts, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Stateville, GA*, 5 FCC Rcd 2685 (1990). We do recognize that Honor is incorporated and listed in the 1990 census, meeting the basic criteria for community status. However, we may find that a population grouping of 292 people does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social or civic organizations and some from of government. *See Searles Valley, CA*, 3 FCC Rcd 5221 (1988); *see also, Naples, FL*, 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Honor to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with Honor.[2] Petitioner should show the organizations, civic groups, etc., have a nexus with the community in question.

4. In view of the fact that the proposed allotment would provide a first local broadcast service to Honor, the Commission believes it would serve the public interest to solicit comments to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Honor, Michigan	—	264A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 19, 1995**, and reply comments on or before **November 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jacqueline F. Bourgard
P.O. Box 365
Mesick, Michigan 49668

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and com-

[1] The coordinates for Channel 264A at Honor, Michigan, are 44-41-26 and 86-01-05.

[2] It is always in the commenter's best interest to present the Commission with supporting evidence during the rule making process. Timely disclosure ensures that all information will be considered in the deliberations before an allotment is granted or denied.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-138

In the Matter of

Amendment of Section 73.202(b) RM-8684
Table of Allotments,
FM Broadcast Stations.
(Casper, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 16, 1995; Released: August 28, 1995

Comment Date: October 19, 1995
Reply Comment Date: November 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making jointly filed by Bruce L Erickson ("Erickson"), Hart Mountain Media, Inc. ("Hart") and Rule Communications ("Rule") (jointly referred to as "petitioners"), proposing the allotment of Channels 273A and 284A at Casper, Wyoming, as potentially the community's sixth and seventh local commercial FM transmission services. If Channels 273A and 284A are allotted at Casper with cut-off protection, petitioners also request that Rule be allowed to amend its application to specify operation on Channel 273A in lieu of Channel 247A, and that Hart be allowed to amend its application to specify operation on Channel 284A in lieu of Channel 247A. Hart and Rule state their intention to apply for Channels 273A and 284A, respectively, if allotted to Casper with cut-off protection.

2. In support of their proposal, petitioners state that the allotment of Channels 273A and 284A will eliminate the mutual exclusivity among the three pending applications for a new Class A station at Casper. Petitioners further state that at the present time, there is no basis upon which to either designate the applications for a comparative hearing, or to otherwise resolve the mutually exclusive applications, citing *Bechtel* v. *Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993). Accordingly, petitioners assert that the allotment of Channels 273A and 284A at Casper, will allow all three pending applications to be granted. Petitioners contend that this proposal is consistent with the Commission's policy to resolve conflict between applicants to provide the community with additional FM transmission service, and would also avoid a comparative hearing, citing *Cheyenne and Saratoga, Wyoming*, 10 FCC Rcd 6722 (1995); *Albion, Nebraska*, 10 FCC Rcd 3183 (1995), *rev. denied*, FCC 95-265, released June 27, 1995; *Lander, Wyoming*, 46 F.R. 39605, August 4, 1981. Additionally, in the event there are additional expressions of interest for a Class A channel at Casper, petitioners advise that Channel 299A is available. Therefore, petitioners urge that Channel 273A and 284A be allotted at Casper for Rule and Hart, respectively, with cut-off protection, and that they be allowed to amend their applications accordingly. Thus, the grant of this proposal, will leave Erickson as a singleton for Channel 247A at Casper, and thereby resolving the mutual exclusivity for Channel 247A.

3. We believe that the proposal warrants consideration since it could potentially provide the community with its sixth and seventh local commercial FM transmission services. Additionally, the allotment of Channels 273A and 284A at Casper would allow Rule and Hart to amend their applications for Channel 247A at Casper, thereby resolving the mutual exclusivity for the channel. An engineering analysis has determined that Channels 273A and 284A can be allotted to Casper in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[1] Since it appears that there is an additional equivalent class channel available for other expressions of interest at Casper, we shall propose to allow Rule and Hart to amend their applications to specify operation on Channels 273A and 284A, respectively, with cut-off protection.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Casper, Wyoming	233C, 238C, 247A 279C, 295C	233C, 238C, 247A 273A, 279C, 284A, 295C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 19, 1995**, and reply comments on or before **November 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the following:

John R. Wilner, Esq.
Bryan Cave, L.L.P.
700 13th Street, N.W.
Washington, D.C. 20005-3960
(Counsel for Bruce L. Erickson)

[1] The coordinates for Channels 273A and 284A at Casper are North Latitude 42-50-48 and West Longitude 106-18-48.

Barry Skidelsky, Esq.
655 Madison Avenue
19th Floor
New York, New York 10021
(Counsel for Hart Mountain Media, Inc.)

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Rule Communications)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-137

In the Matter of

Amendment of Section 73.202(b) RM-8683
Table of Allotments,
FM Broadcast Stations.
(Milton, West Virginia and
Flemingsburg, Kentucky)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: August 16, 1995; Released: August 28, 1995

Comment Date: October 19, 1995
Reply Comment Date: November 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Simmons Broadcasting Company ("petitioner"), licensee of Station WFXN(FM), Channel 292A, Milton, West Virginia, proposing the substitution of Channel 292B1 for Channel 292A at Milton, West Virginia, and the modification of Station WFXN(FM)'s license accordingly. To accommodate the upgrade, petitioner also proposes the substitution of Channel 236A for Channel 292A at Flemingsburg, Kentucky, and the modification of Station WFLE-FM's license accordingly. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration since it could enable Station WFXN(FM) to expand its coverage area. An engineering analysis has determined that Channel 292B1 can be allotted to Milton, West Virginia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.5 miles) southeast to avoid short-spacings to the allotment and application sites for Station WRZZ-FM, Channel 291A, Elizabeth, West Virginia.[1] Additionally, Channel 236A can be allotted to Flemingsburg, Kentucky, in compliance with the Commission's minimum distance separation requirements at Station WFLE-FM's presently licensed site.[2]

3. In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall propose to modify Station WFXN(FM)'s license without entertaining other expressions of interest in the use of Channel 292B1 at Milton, West Virginia, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to the licensee of Station WFLE-FM at Flemingsburg, Kentucky, as to why its license should not be modified to specify operation on Channel 236A in lieu of Channel 292A.

4. Whenever an existing licensee or permittee is ordered to change frequency to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its willingness to reimburse the licensee of Station WFLE-FM for reasonable costs associated with moving to Channel 236A.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Milton, West Virginia	292A	292B1
Flemingsburg, Kentucky	292A	236A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Fleming County Broadcasting, Inc., licensee of Station WFLE-FM, Flemingsburg, Kentucky, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 236A in lieu of Channel 292A.

7. Pursuant to Section 1.87 of the Commission's Rules, Fleming County Broadcasting, Inc., may, not later than **October 19, 1995**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Fleming County Broadcasting, Inc., to furnish additional information. If Fleming County Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Fleming County Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed*

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[1] The coordinates for Channel 292B1 at Milton are North Latitude 38-29-02 and West Longitude 82-12-59. We note that the coordinates are short-spaced to Station WRZZ-FM, Channel 291A, Ravenswood, West Virginia. However, in accordance with the modification provisions set forth in the *Report and Order*, MM Docket 94-15, Station WRZZ-FM has been ordered to move to Elizabeth, West Virginia. *See* 10 FCC Rcd 318 (1995). Therefore, since the Milton allotment is dependent upon the relocation of Station WRZZ-FM from Ravenswood to Elizabeth, West Virginia, the issuance of a license for Channel 292B1 at Milton may be withheld until the license at Elizabeth is granted. We will provide the licensee of Station WRZZ-FM with a copy of this *Notice of Proposed Rule Making and Order to Show Cause*.

[2] The coordinates for Channel 236A at Flemingsburg are North Latitude 38-24-42 and West Longitude 83-34-41.

Rule Making and Order to Show Cause to the following:

Fleming County Broadcasting, Inc. P.O. Box 452 Flemingsburg, Kentucky 41041 (Licensee of Station WFLE-FM)	MediaCom, Inc. P.O. Box 1346 Parkersburg, West Virginia 26102 (Licensee of Station WRZZ-FM)

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **October 19, 1995**, and reply comments on or before **November 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan C. Campbell, Esq.

Irwin, Campbell & Tennenwald, P.C.

1320 18th Street, N.W.

Washington, D.C. 20036

(Counsel for Petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 andh)73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-136

In the Matter of

Amendment of Section 73.606(b) RM-8682
Table of Allotments,
TV Broadcast Stations.
(Sioux Falls, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1995; Released: August 28, 1995

Comment Date: October 19, 1995
Reply Comment Date: November 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Red River Broadcast Corp. ("petitioner"), proposing the allotment of UHF television Channel 46 at Sioux Falls, South Dakota, as potentially the community's sixth local television broadcast service. If the channel is allotted with cut-off protection, petitioner also requests that its pending application for Channel 36+ be amended to specify operation on Channel 46. Petitioner states its intention to apply for Channel 46 at Sioux Falls, if allotted with cut-off protection.

2. In support of its proposal, petitioner states that on December 27, 1994, Red River Broadcast Corp., licensee of VHF television Station KDLT, Channel 5, Mitchell, South Dakota, filed an application (BPCT-941227KI) for a construction permit for Channel 36+, proposing to operate the station in conjunction with Channel 5. On March 17, 1995, Iowa Teleproduction Center and Company also filed an application (BPCT-950317KM) for Channel 36+ at Sioux Falls. Since the applications are mutually exclusive, petitioner states that the conflict would have to be resolved by the burden and expense of a comparative hearing. Petitioner further states that at the present time, there is no basis upon which to either designate the applications for a comparative hearing or to otherwise resolve these mutually exclusive applications, citing *Bechtel* v. *Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993). Petitioner asserts that the allotment of Channel 46 at Sioux Falls can be made in compliance with the Commission technical requirements and its policies for protecting future advance television ("ATV") allocations.[1]

3. Moreover, petitioner contends that since 1982, the Commission's policy has been to add a second channel to a community where the only vacant channel is subject to a comparative hearing, if the second channel can be added consistent with other allotment policies, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Thus, petitioner declares that in identical situations where, as here, competing applications are filed for the only vacant channel, the Commission has allotted another channel to eliminate the need for a hearing, citing *Copeland, Kansas*, 5 FCC Rcd 7682 (1990); *Roseburg, Oregon*, 6 FCC Rcd 4369 (1991); and *Albion, Nebraska*, 10 FCC Rcd 3183 (1995), *aff'd*, FCC 95-265 (June 27, 1995). In these proceedings, petitioner asserts that the Commission has also allowed the applicant to apply for the new channel without being subject to cut-off procedures as long as (a) no expressions of interest in the new channel are filed in the rule making; or (b) if such expressions are filed, there is at least one additional channel which can be allotted to accommodate those parties. If there are additional expressions of interest, petitioner advises that Channel 64 is available at Sioux Falls. Accordingly, petitioner claims that the allotment of Channel 46, with cut-off protection, will enable the applicants to pursue their applications promptly, expediting authorization of new television service to Sioux Falls, and thus providing the public with access to additional stations.

4. We believe petitioner's proposal warrants consideration because the allotment of Channel 46 at Sioux Falls, South Dakota, could potentially provide the community with its sixth local television broadcast service. In addition, the proposed allotment of Channel 46 at Sioux Falls would accommodate both applicants' request for a television channel and avoid a comparative hearing for Channel 36+. An engineering analysis has determined that Channel 46, with zero offset, can be allotted to Sioux Falls in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[2] Since it appears that there is an additional UHF television channel available for other expressions of interest at Sioux Falls, we shall propose to allow petitioner to amend its application to specify operation on Channel 46 in lieu of Channel 36+, with cut-off protection.

5. Accordingly, we shall seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sioux Falls, South Dakota	11,13+, 17-, *23, 36+	11, 13+, 17-, *23, 36+, 46

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we

[1] Sioux Falls is over 300 kilometers from the Minneapolis-St. Paul, Minnesota freeze area, and thus is not subject to the ATV freeze. *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed Reg. 28346, July 29, 1987.

[2] The coordinates for Channel 46 at Sioux Falls are North Latitude 43-32-30 and West Longitude 96-44-00.

note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 19, 1995**, and reply comments on or before **November 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John T. Scott, III
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(Counsel for Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-304

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Anaheim, California
in the Los Angeles-San Bernardino-
Corona-Fontana-Riverside, California
Television Market

REPORT AND ORDER

Adopted: August 15, 1995; Released: August 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making*[1] in the captioned proceeding, issued in response to a petition filed by Golden Orange Broadcasting Co., licensee of television station KDOC-TV, channel 56, Anaheim, California ("KDOC") and the comments received in response thereto. The *Notice* proposed to amend Section 76.51 of the Commission's Rules,[2] to change the designation of the Los Angeles-San Bernardino-Corona-Fontana-Riverside, California television market to "Los Angeles-San Bernardino-Corona-Fontana-Riverside-Anaheim, California." Community Cablevision Company, d/b/a Dimension Cable Services ("Dimension Cable"), a cable television system operator providing service to Newport Beach, Irvine, Tustin, and Orange, the University of California, Irvine and the Marine Corps Air Stations in Tustin and El Toro filed comments, to which KDOC filed a reply.

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine the scope of territorial exclusivity rights that television broadcast stations may purchase and, in addition, may help define the scope of compulsory copyright license liability for cable operators in certain circumstances.[3] Certain cable television syndicated exclusivity and network nonduplication rights are also determined by the presence of broadcast station communities of license on this list.[4] Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.[5] Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.[6]

3. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[7] which amended Section 614 of the Communications Act of 1934, as amended ("Act"),[8] requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules.[9]

NOTICE OF PROPOSED RULE MAKING

4. The *Notice of Proposed Rule Making* in this proceeding noted that Anaheim was in the center of the Los Angeles market, 21 miles from downtown Los Angeles and virtually encompassed within the combined 35-miles zones of San Bernardino, Corona and Fontana and that KDOC-TV's Grade B signal contour encompasses all of the designated communities in the market. Its Grade B signal contour, the *Notice* indicated, was similar in location and coverage to the Grade B contours of other market-area stations. Further KDOC-TV's transmitter is located at the same Sunset Ridge site as those of television stations KSCI and KZKI which are licensed to San Bernardino.

RULE MAKING COMMENTS

5. Petitioner KDOC filed brief comments in support of the requested change in the rules stating that "there is sufficient commonality between Anaheim and the existing communities in the television market to merit the inclusion of Anaheim in that market." Dimension Cable in its comments incorporated by reference comments it had filed in Docket 93-290, a proceeding involving the New York television market in which parties had been invited to address issues relating to market hyphenation in large and complex markets like the New York and Los Angeles markets.[10] In those comments Dimension argued that television stations in large markets were constrained in seeking to exercise mandatory cable carriage rights by copyright payment obligations outside of the market area defined by Section 76.51 of the Commission's rules. It then argued:

> Had Congress intended to relieve broadcast stations of potential copyright liability in order to qualify for must carry status, it could have required wholesale revisions to Section 76.51 of the Commission rules or amended Section 111 of the Copyright Act. Rather than doing so, Congress expressed its intent *not* to work any fundamental changes in the copyright law. As commenters in this proceeding have urged, the

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1 8 FCC Rcd 8779 (1993).
2 47 C.F.R. §76.51.
3 *See* 47 C.F.R. §73.658(m) and 17 U.S.C. §111(f).
4 *See* 47 C.F.R. Part 76, subpart F.
5 *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974).
6 *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).
7 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).
8 47 U.S.C. §614.
9 *See* Section 614(f) of the Act.
10 *Notice of Proposed Rulemaking in MM Docket 93-304*, DA 93-1500 (released December 21, 1993) at para. 8.

> Commission should not now allow stations to obtain must carry rights (and end-run the statute) through market redesignation . . . . (footnotes omitted).

Thus, it urged the Commission not to adopt the proposed market redesignation.

DISCUSSION

6. A "hyphenated market" has been described by the Commission as a television market that contains more than one major population center supporting all stations in the market, with competing stations licensed to different cities within the market area.[11] In evaluating past requests for hyphenation of a market, the Commission has considered the following as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area;[12] (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change.[13] Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[14]

7. Based on the facts set forth in the *Notice of Rulemaking*, which have not been disputed by the comments herein, and on the responsive comments, we believe that a case for redesignation of the subject market has been set forth so that this proposal should be adopted. It appears from the information before us that television stations licensed to Los Angeles, San Bernardino, Corona, Riverside and Anaheim do compete in the proposed combined market area, and that sufficient evidence has been presented to demonstrate commonality between the proposed community to be added to the market designation and the market as a whole.[15] Such a rationalization of the competitive situation appears to be the public benefit which congress anticipated by instructing the Commission, in Section 614(f) of the Cable Television Consumer Protection and Competition Act of 1992, to make necessary revisions to update the market list. This action, moreover, is entirely consistent with the *Report and Order in Docket 93-207*,[16] which added Riverside as a designated community in the market.

8. The issue raised by Dimension Cable regarding copyright liability has largely been resolved with the passage of the Satellite Home Viewer Act of 1994,[17] which amended Section 111(f) of title 17, United States Code.[18] Under this Act, a station located within the same ADI as a cable system is no longer considered a "distant signal" on that system for purposes of compulsory copyright license liability and, therefore, is not subject to the additional copyright fees attendant to "distant signal" carriage within the market.[19] Thus, the issue raised by Dimension has now been directly addressed by Congress and is not an obstacle to the action proposed in this proceeding.

9. This proceeding is not intended to address the specific mandatory cable carriage, syndicated exclusivity or network nonduplication obligations of individual cable systems. Redesignation of the market reflects in the rules the general competitive situation that in fact exists in the local area, allowing the application of the more specific rules, including those relating to "area of dominant influence" changes, to be addressed from the perspective of a properly defined market area. Accordingly, the proposed rule change will be adopted.

10. Accordingly, IT IS ORDERED, that effective [30 days after publication in Federal Register], Section 76.51 of the Commission's Rules IS AMENDED to include Anaheim and delete Fontana as follows:

Los Angeles-San Bernardino-Corona-Riverside-Anaheim, California

11. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

12. This action is taken pursuant to authority delegated by Section 0.321 of the Commissions rules. 47 C.F.R. §0.321

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[11] *Cable Television Report and Order*, 36 FCC 2d 143, 176 (1972).

[12] This concern -- that cable carriage might be provided in areas beyond a stations Grade B signal contour -- has reduced relevance under the must-carry rules included in the 1992 Cable Act which are based on "Area of Dominant Influence" geographic market areas rather than on Grade B contours.

[13] *See e. g., Fresno-Visalia, California*, 57 R.R. 2d 1122, 1124 (1985); *TV 14, Inc. (Rome, Georgia)*, 7 FCC Rcd 8591 (1992).

[14] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[15] No station is licensed to Fontana and thus, consistent with the Commission's decision in *Amendment of Part 76 (Jacksonville, Ill.)* 49 FCC 2d 198 (1974) and *Amendment of Part 76 (Muskegon, MI.)*, 47 FCC 2d 990 (1974), reference to it will be eliminated from Section 76.51. This has no substantive consequence because only communities with licensed stations have "specified zones" (Section 76.5(e) and contribute to the area and coverage of a hyphenated market (Section 76.5(f)).

[16] 8 FCC Rcd 8472 (1993).

[17] Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994).

[18] 17 U.S.C. §111(f). KDOC-TV filed its petition for rule making to amend Section 76.51 of the Commission's Rules on December 16, 1993, prior to the passage of the Satellite Home Viewer Act which was signed into law on October 18, 1994.

[19] 108 Stat. 3481.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Entertainment Co., L.P., Advance/Newhouse Partnership, and Time Warner Entertainment-Advance/Newhouse Partnership Transfer of Control

File Nos. CAR- 45134-08, *et al.*

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1995; Released: March 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 30, 1994, Time Warner Entertainment Co., L.P., ("TWE"), filed applications for authority to transfer, pursuant to Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), thirty Cable Television Relay Service (CARS) licenses from Advance/Newhouse Partnership ("Advance/Newhouse") and forty-three CARS licenses from TWE, as part of its proposed merger of the TWE and Advance/Newhouse cable systems into the Time Warner Entertainment-Advance/Newhouse Partnership ("the Partnership"). As explained below, the Bureau finds that approving the proposed license transfers will serve the public interest, convenience and necessity. Therefore, the Bureau grants the transfer applications.

II. BACKGROUND

2. Time Warner Entertainment Co., L.P. ("TWE"), was formed as a limited partnership and has, since June 30, 1992, owned and operated substantially all of the filmed entertainment, cable television and cable television programming businesses, as well as other businesses, previously owned and operated by Time Warner Inc.[1] The Time Warner Cable division ("Time Warner Cable") of TWE operates TWE's cable television systems.[2] Time Warner Cable's wholly and partially owned cable systems serve approximately 7.2 million cable subscribers located in 34 states.[3] Time Warner Cable is the second-largest multiple system cable operator in the United States, owning or operating 22 of the largest 100 U.S. cable systems.[4] TWE has total assets exceeding $17 billion.[5]

3. Advance/Newhouse Partnership is a general partnership between Newhouse Broadcasting Corporation and a wholly-owned subsidiary of Advance Publications, Inc.[6] Advance/Newhouse's cable television systems serve approximately 1.4 million subscribers.[7] Newhouse Broadcasting Corp. is owned 50% by S.I. Newhouse, Jr. and 50% by Donald E. Newhouse.[8] Metrovision, Inc., NewChannels Corp. and Vision Cable Communications, Inc. ("Vision"), each operate Advance/Newhouse's cable television systems and are subsidiaries of Newhouse Broadcasting Corp. Vision Cable of Pinellas, Inc. is a subsidiary of Vision Cable Southern Systems, Inc., which is a subsidiary of Vision Cable Communications, Inc.

4. TWE and Advance/Newhouse have formed a general partnership, the Partnership, to which Advance/Newhouse will contribute all of its cable television systems, with 1.4 million customers, along with certain related assets and TWE will contribute certain of its cable television systems (or TWE's interests therein), which serve approximately 2.8 million subscribers, and certain related assets.[9] TWE will own a two-thirds equity interest in the Partnership and Advance/Newhouse will own a one-third equity interest.[10]

5. As a result, TWE would have interests in cable systems that provide service to approximately 8.8 million subscribers,[11] approximately 14.5% of the subscribers in the United States.[12] The Partnership's total value has been estimated at approximately $8.4 billion.[13]

6. The applications to transfer the Advance/Newhouse CARS licenses and the TWE CARS licenses to the Partnership were placed on public notice on December 7, 1994. A supplemental public notice was issued on December 19, 1994, establishing a pleading cycle for oppositions and replies. Talk TV, a Florida corporation which produces programming for distribution over cable television systems using a live call-in format, filed a Petition to Deny the

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[1] Time Warner Entertainment Co., L.P., *Form 10-K* at I-1 (December 31, 1993) (*"10-K"*). Time Warner Inc. owns 100% of TW Partners, which owns 63.27% of TWE and is its general partner. Wholly owned subsidiaries of ITOCHU Corp., and Toshiba Corp., together with US West Corp., own 36.73% of TWE and are its limited partners. The TW Partners are Warner Communications Inc., American Television and Communications Corp., Time Warner Operations Inc., Warner Cable Communications Inc., Capital Cablevision Systems, Inc., Memphis CATV, Inc., and People's Cable Corp., each of which is a direct or indirect wholly owned subsidiary of Time Warner. *10-K* at I-1 to I-2.

[2] *Id.* at I-13.

[3] *Id.*

[4] *Id.*

[5] *Id.* at F-21.

[6] Time Warner Entertainment Co., L.P., *Form 8-K* at 2, September 9, 1994 (*"8-K"*).

[7] *Id.*

[8] *See Application for Cable Television Relay Service Station Authorization*, Exhibit B-6, CAR- 45135-08.

[9] *8-K* at 2.

[10] *Id.*

[11] Paul Kagan Associates, Inc., *Top 100 Cable System Operators as of November 30, 1994*, Cable TV Investor, January 31, 1995 (insert).

[12] Based upon the total number of subscribers nationwide, using Paul Kagan Associates, Inc., *The Cable TV Financial Databook 14-15* (1994); Paul Kagan Associates, Inc., *Top 100 Cable System Operators as of November 30, 1994.*

[13] Robichaux, *Time Warner to Put Some Cable Systems Into Venture With Newhouse Operations*, Wall St. J., Sept. 13, 1994, at

transfer of the CARS licenses.[14] Vision filed an Opposition to Talk TV's Petition,[15] and Talk TV filed a Reply to Vision's Opposition.[16]

III. PETITION TO DEFER AND DENY AND OPPOSITION

7. In its Petition, Talk TV asserts that Vision is not qualified to be a Commission licensee and that, therefore, the Commission should deny the transfer applications, which would transfer the CARS licenses from Vision to a partnership in which Vision's parent will be a one-third owner.[17] Talk TV alleges that Vision does not have the proper character to be a licensee because it improperly denied Talk TV's request to lease time on Vision's Clearwater, Florida cable television system.[18] Talk TV has a pending lawsuit, which alleges that Vision's denial violates the Cable Act.[19]

8. Talk TV asserts that the Commission should apply to CARS license applicants the qualification standards the Commission has established for broadcast applicants in the *Policy Regarding Character Qualifications in Broadcast Licensing ("Character Policy Statement")*.[20] In that statement, the Commission said that in determining the qualifications for holding a Commission broadcast license, the Commission will examine an applicant's character, including past misconduct of an applicant. In making this determination, the Commission will consider the willfulness, frequency, and currency of an applicant's misconduct, the participation of an applicant's managers and owners, and any efforts made by an applicant to remedy the wrongdoing.[21] Talk TV asserts that Vision's denial of Talk TV's leased access requests demonstrates willful violations of the Commission's rules, a type of misconduct encompassed by the *Character Policy Statement*.[22] Talk TV asserts this is a sufficient reason to deny a license transfer to Vision.

9. Talk TV urges further that, rather than acting on the petition to deny at this time, the Commission may wish to defer action on the CARS transfer applications pending resolution of the court proceeding.[23] Following resolution of that proceeding, the Commission could designate the applications for hearing. By proceeding in this manner, the Commission can avoid having both the Court and the Commission make factual determinations on the same matters.[24]

10. In its Opposition, Vision asserts that (1) Talk TV has chosen an inappropriate vehicle by which to assert its leased access complaint,[25] (2) Talk TV lacks standing to file a petition to deny,[26] and (3) Talk TV's discussion of the Commission's remedies for licensee misconduct is inapplicable to the instant situation.[27] Vision contends that a grant of the CARS license assignments would in no way affect Talk TV's ability, in its pending court action against Vision Cable of Pinellas, Inc., to recover damages and restore access to Vision's cable system.[28]

11. Vision's first argument is that Section 612 of the CableTelevision Consumer Protection and Competition Act of 1992 provides for specific and, by inference, exclusive remedies for persons with complaints arising under the Act's leased access provision. Vision states that the appropriate remedies are either a district court action or a petition to the Commission for relief.[29] Vision argues that Talk TV has missed the 60-day procedural deadline set out in Commission rules for filing petitions for relief. Thus, Talk TV's only appropriate course of action is to pursue its pending court case. In these circumstances, Vision asserts, Talk TV should not be permitted to evade the leased access procedures by asserting its leased access claims in this CARS license transfer proceeding.[30]

12. Vision's second argument is that Talk TV is not a "party in interest," and, therefore, lacks standing to object to the license transfer applications.[31] Vision asserts that in order to file a petition to deny, Talk TV must show that it is a party in interest according to Section 309(d)(1) of the

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[14] Talk TV, Inc., *Petition to Defer and Deny*, January 13, 1995, at 3 (*"Petition"*).

[15] Vision Cable Communications, Inc., *Opposition to Petition to Defer and Deny*, Jan. 26, 1995 (*"Opposition"*). On January 20, Vision filed a *Request For Clarification, Or, In the Alternative, Motion for Extension of Time*. Since there was no opposition to this motion, the request was granted and Vision was given until January 26, 1995 to reply.

[16] Talk TV, Inc., *Reply to Opposition to Petition to Defer and Deny*, Feb. 7, 1995 (*"Reply"*). On February 10, 1995, Talk TV, Inc., filed a *Submission Of Original Declarations* referenced in Talk TV's February 7, 1995, *Reply To Opposition To Petition To Defer and To Deny*. On March 8, Talk TV filed a letter alleging violations of the Commission's *ex parte* rules by Advance/Newhouse. Talk TV's letter referred to a March 3 letter from TWE to Deborah Klein which disclosed the existence of oral communications between Advance-Newhouse and FCC personnel. On March 13, Advance/Newhouse filed a response to Talk TV's letter disclosing the substance of those communications. On March 16, Talk TV filed a response to Advance/Newhouse's March 13 letter, again alleging violations of the *ex parte* rules arising out one of the same communications referred to in Talk TV's March 8 letter. On March 17, TWE filed a letter which was served on Talk TV. The *ex parte* matter has been referred to the Office of the Managing Director, *see* 47 C.F.R. § 1.1212, 1.1214, and does not necessitate delay in the disposition of the license transfers.

[17] *Id.* at 10.

[18] *Petition* at 5. Talk TV asserts that, in several instances in the past three years, it has approached Vision to make leased access channel capacity available to Talk TV on Vision's Clearwater, Florida cable system and that it has been unsuccessful in those attempts.

[19] *See infra* note 23.

[20] 102 FCC 2d 1179 (1986).

[21] *Character Policy Statement*, 102 FCC 2d at 1227-28.

[22] *Petition* at 10-11.

[23] *Id.* at 1. ASE Complaint, *Talk TV, Inc. v. Vision Cable of Pinellas, Inc.*, Civ. Action No. 95-54-CIV-T-24B (M.D. Fla. filed Jan.13, 1995).

[24] *Id. at 12.*

[25] *Opposition* at 3-8.

[26] *Id.* at 5.

[27] *Id.* at 15. Vision contends that Talk TV mistakenly discussed the remedy for misconduct by broadcast licensees rather than cable television licensees. *Id.* at 15-16.

[28] *Id.*

[29] § 612(d)-36(e) of the Communications Act of 1943, *as amended*, ("Communications Act"), 47 U.S.C. § 532; § 76.975(b) of the Commission's Rules.

[30] *Opposition* at 5, citing 47 C.F.R. § 76.975(d).

[31] *Id.* at 5, citing *Pinelands, Inc.*, ¶18 , 7 FCC Rcd 6058 (1992) (*"Pinelands"*).

Communications Act, which states that any "party in interest" may file a petition to deny an application for a license.[32]

13. Vision's third argument is that Talk TV's misconduct assertions are irrelevant to the Commission's determination of whether to approve the CARS transfer applications, because the *Character Policy Statement* cites factors only relevant to broadcast licensees, not to CARS licensees.[33] Vision states that the FCC has recognized that character issues carry less weight in the context of non-broadcast licenses, such as CARS, than they do in the broadcast license context."[34] Vision notes"that in *Cablecom-General, Inc.*, the Commission distinguished CARS licenses from broadcast licenses, the type of license discussed in the *Character Policy Statement*. Vision asserts that the Commission has stated that while "[b]roadcast licensees have a special responsibility for the content of the information which they disseminate to the public," "CARS licenses do not afford the licensee a medium to communicate directly with the public; but instead merely provide a medium by which the cable system operator relays programming produced by others between and among other communications facilities."[35] Vision cites a Commission opinion stating that a CARS licensee "operates as a mere conduit for the transmission of information" and does not have "control or responsibility for the content of the information . . . which it transmits."[36] For these reasons, Vision alleges that the broadcast standards set forth in the *Character Policy Statement* should not be applied to persons seeking to transfer CARS licenses and concludes that the misconduct assertions made by Talk TV should be dismissed.

14. In its Reply, Talk TV disagrees with Vision's argument that violations of the leased access rules may only be considered in a federal district court proceeding or in a complaint filed with the Commission.[37] Talk TV contends that Section 309(d)(1) of the Communications Act establishes a broad right for any party in interest to file a petition to deny any application subject to Section 309(b) of the Communications Act, including applications for CARS licenses.[38]

15. Talk TV also disagrees with Vision's claim that Talk TV lacks the requisite standing to file a petition to deny.[39] Talk TV asserts that a party has standing to contest an action that results in a concrete economic injury to that party.[40] Talk TV contends that it has suffered economic injury sufficient to give it standing.[41]

16. Talk TV states that Vision's reliance on *Cablecom* is misguided, since that case involved the assignment of CARS licenses from RKO to a third party despite the findings of misconduct against RKO's broadcast stations.[42] Talk TV asserts that the instant case is different from *Cablecom* because the proposed assignment will result in the formation of a partnership in which Vision's owners will have an interest. Thus, unlike *Cablecom*, the Petition questions the qualifications of both the transferor and transferee, rather than the transferor alone.[43] Talk TV also cites language in *Cablecom* in which the Commission said that the decision "should not be read overly broad."[44]

IV. DISCUSSION

17. Talk TV lacks the qualifications set by the Communications Act for filing a petition to deny. Section 309(d)(1) of the Act states that any "party in interest may file with the Commission a petition to deny any application."[45] A party in interest has been defined as "an individual or entity which is able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature."[46] Talk TV's assertion that it will suffer injury as a result of the grant of the instant application is incorrect. Vision's allegedly improper denial of Talk TV's leased access requests, not the proposed license transfers, has been the proximate cause of Talk TV's injury, if any. Nonetheless, as in the Commission's *Pinelands* decision, the Bureau will consider the allegations made by Talk TV as part of the Commission's "independent public interest analysis."[47]

18. Vision has characterized Talk TV's Petition as an inappropriate vehicle for Commission consideration of Vision's alleged improper denial of Talk TV's leased access request. Talk TV, however, is not asking us to resolve its leased access complaint in the context of this Petition. Nor is it seeking relief for Vision's alleged violation of the leased access rules. Rather, Talk TV is asserting that the proposed license transfers will not serve the public interest because the character of one of the transferees, Vision, disqualifies it from receiving a license. As will be discussed below, a transferee's character is an appropriate factor to consider in determining whether Commission approval of a CARS license transfer application serves the public interest.

19. Section 310(d) provides that in granting a license transfer, the Commission must find that the "public interest, convenience, and necessity will be served" by the transfer.[48] In *Cablecom*, the Commission noted that Section 310(b) of the Communications Act requires that transfer applications be construed as if the proposed transferee were applying *ab initio* for the license under Section 308(b) of

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[32] *Opposition* at 5; 47 U.S.C. 309(d)(1). License transfer applications are governed by Section 310(d) of the Communications Act, which directs the Commission to dispose of the applications pursuant to procedures established by Section 308 of the Act. Section 308 gives the Commission authority to grant licenses. Section 309(d)(1) states that any party in interest may file a petition to deny a license application.

[33] *Opposition* at 16.

[34] *Id.* at 16-17; *see Cablecom-General, Inc.*, 49 RR 2d 1057, 1060 (1981) (*"Cablecom"*) ("[t]here is nothing inherent in the public interest standard which mandates that we evaluate CARS . . . and broadcast transfers in an identical manner . . . .").

[35] Petition at 17; *Cablecom*, 49 RR 2d at 1060-61.

[36] *Cablecom*, 49 RR 2d at 1061.

[37] *Opposition* at 3-5; *Reply* at 3-4.

[38] *Reply* at 3-4.

[39] *Opposition* at 5-7; *Reply* at 4-5.

[40] *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 673 (D.C. Cir. 1987).

[41] *Reply* at 5.

[42] *Id.* at 5-6.

[43] *Id.* at 5-6, citing *Cablecom*, 49 RR 2d at 1060 n.10.

[44] *Cablecom*, 49 RR 2d at 1063 n.23.

[45] *See* Section 309(d)(1) of the Communications Act. Section 309(d)(1) also states that the petition should contain specific allegations of fact sufficient to show that petitioner is a party in interest.

[46] *See Pinelands* ¶ 18, 7 FCC Rcd at 6063; *Telesis Corp.*, 68 FCC 2d 696 (1978).

[47] *Pinelands* ¶ 18, 7 FCC Rcd at 6063.

[48] 47 U.S.C. § 310(d).

the Act.[49] Section 308(b) provides that applicants (including prospective transferees) "shall set forth such facts as the Commission . . . may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station."[50] In *Teleprompter Corporation*,[51] the Commission stated that in evaluating CARS license transfers, "we must make a judgment as to how that applicant will conduct itself in the future. We look to an applicant's past conduct . . . as a guide to how an applicant is likely to operate its station in the future."[52] Because of the different nature of the services provided the public by broadcast and CARS licensees,[53] the Commission need not employ the same method in evaluating CARS license transfer applications as it uses for broadcast licensees.[54] But in deciding whether to approve the transfer applications, the Commission must decide whether the Partnership is a "qualified applicant" transferee.[55] Although in *Cablecom*, the Commission drew a number of important distinctions between CARS licensees and broadcast licensees, the Commission also noted "that there are no material questions as to the proposed *transferee's* qualifications to operate any of these stations."[56]

20. The Commission's *Character Policy Statement*, which the Commission established for broadcast licensees, provides a reasonable analytic framework to use in determining whether the public interest would be served by approving a CARS license transfer to a particular transferee. The Commission has previously applied the character qualifications expressed in the *Character Policy Statement* when evaluating the character qualifications of prospective licensees for similar services.[57]

21. In its *Character Policy Statement*, the Commission stated that "future inquiries into an applicant's basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies."[58] In examining the likelihood that, in the future, a licensee applicant will comply with the Act and the Commission's rules, the Commission considers "the willfulness of the misconduct, the frequency of such behavior, and its currency," as well as the seriousness of the misconduct, the nature of the participation, if any, of a licensee's managers and owners, and a licensee's efforts to remedy the wrong.[59]

22. In order to be entitled to a hearing, a party must show that "a grant of the application would be prima facie inconsistent with the public interest."[60] Courts have determined that "the decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion is paramount."[61] Talk TV's Petition proffers but a single instance of alleged, but unadjudicated, misconduct. Nor has it presented information suggesting that the alleged violation involves bad faith rather than simply a dispute over the application of the rules and their requirements.

23. Talk TV's Petition does not allege sufficiently egregious conduct by Vision to support a decision to defer granting the license transfers until after the court decides the leased access issues. Nor is it necessary to conduct an independent fact finding investigation on the leased access issue at this time. Further, assuming Talk TV's leased access allegations against Vision to be true, such conduct is an insufficient basis on which to deny the license transfer applications. Denial of a license to operate multiple cable systems is a significantly greater penalty than those prescribed by the Commission in its leased access rules.[62] If, however, a subsequent decision demonstrates that Vision has violated the Communications Act or the Commission's rules or policies, or has engaged in anticompetitive conduct,[63] then Talk TV may bring that decision to the Bureau's attention in a subsequent proceeding.

24. In the absence of any showing by Talk TV or anyone else that approval of the applications to transfer CARS licenses to the Partnership would not be in the public interest, the Bureau denies Talk TV's Petition.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the pending CARS license transfer applications referenced herein are GRANTED.

26. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321 (1993).

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[49] *Cablecom*, 49 RR 2d at 1060 n.10; 47 U.S.C. § 310(b).

[50] 47 U.S.C. § 308(b) (emphasis added).

[51] 87 FCC 2d 531 (1981).

[52] *Id.* ¶ 83, at 571.

[53] *See supra* para. 13.

[54] *Cablecom*, 49 RR 2d at 1060.

[55] This review contrasts with a review of the transferor's character qualifications, which would serve no valid purpose in this proceeding. *See Cablecom*, 49 RR 2d at 1061-62.

[56] 49 RR 2d at 1060 n.10.

[57] *See Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988) (using the broadcast policy statement as guidance when evaluating the qualifications of microwave radio licensees); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd 753 (1986) (applying the broadcast character standards to a Domestic Public Radio Service (DPLMRS) application). *See also Policy Regarding Character Qualifications in Broadcast Licensing, Memorandum Opinion and Order* ¶ 18, 1 FCC Rcd 421, 424 (1986) (Gen. Dkt. No. 81-500) (Common carrier character issues "are adjudicated on a case-by-case basis without the guidance of a specific policy statement. As a result, reference is occasionally made in common carrier cases to broadcast policies and precedents as aids in resolving character issues."

[58] *Character Policy Statement* ¶ 7, 102 FCC 2d at 1183.

[59] *Id.* ¶ ¶ 102-06, 102 FCC 2d at 1227-29.

[60] *Gencom Inc. v. FCC*, 832 F.2d 171, 180 (D.C. Cir. 1987); 47 U.S.C. § 309(d)(1)-(2).

[61] *Gencom Inc.*, 832 F.2d at 181, (quoting *United States v. FCC*, 652 F.2d 72, 91 (D.C. Cir. 1980)).

[62] Section 612(d) of the Communications Act provides that any person with a leased access complaint may bring an action in U.S. district court, and that if the court finds that the channel capacity sought was not made available, the court may order such system to make it available, and may award actual damages if appropriate. 47 U.S.C. § 532(d). The leased access rules also provide that the aggrieved person may petition the Commission for relief upon a showing of prior adjudication of Section 612 violations, and that the Commission may establish any further rule or order necessary to comply with the section. 47 U.S.C. § 532(e).

[63] *See Character Policy Statement* ¶ ¶ *42-44*, 102 FCC 2d at 1200-03 (when business misconduct rises to the level of an adjudicated violation of anticompetitive or antitrust laws, then the Commission could consider the activity relevant to an applicant's character).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 31, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NCTA'S MOTION TO ORDER REVOCATION OF SNET MARKET TRIAL AUTHORIZATION

FILE NO. W-P-C-6858

On March 28, 1995, the National Cable Television Association, Inc. (NCTA) filed a motion requesting that the Commission revoke the Section 214 authority granted to Southern New England Telephone Company (SNET) to conduct a video dialtone technical and market trial. The Commission initially granted SNET permission to conduct a limited, one-year trial in West Hartford, Connecticut. Subsequently, the Commission authorized SNET to expand its video dialtone trial to include additional communities in its service area. (*See Order and Authorization*, 9 FCC Rcd 1019 (1993) and *Order and Authorization*, 9 FCC Rcd 7715 (1994).)

NCTA argues that based on SNET's recent tariff filing for the market trial, it appears that SNET is not in compliance with its authorization. NCTA adds that SNET has not notified the Commission of any changes to its Section 214 authorization. Thus, NCTA contends that SNET's Section 214 certificate should be revoked.

Interested parties are invited to file comments on the motion. Comments should be filed by **April 10, 1995**, and reply comments by **April 17, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the motion can be obtained from ITS at (202) 857-3800. The motion is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SBC Cable Company CUID No. IL0080 (Olney)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1995; Released: April 7, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	CUID Nos.
Withdrawal of	NJ0008 Stafford Township
FCC Form 329	NJ0085 Beachwood Borough
Rate Complaint	NJ0090 Barnegat Township
Against Adelphia	NJ0140 Pine Beach Borough
Cable Communications	NJ0141 Ocean Gate Borough
	NJ0143 S. Tom's River Borough
	NJ0160 Dover Township
	NJ0177 Eagleswood Township
	NJ0178 Tuckerton Borough
	NJ0179 Little Egg Harbor Township
	NJ0499 Crestwood Village
	NJ0500 Lakehurst Borough
	NJ0570 Manahawkin

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. The New Jersey Board of Regulatory Commissioners/Office of Cable Television ("Board") filed a single complaint on February 28, 1994 with this Commission alleging that the prices charged by Adelphia Cable Communications d/b/a Clear Cablevision, Inc. ("Adelphia") for cable programming service tier (CPS) services in the communities referenced above were unreasonably high. On February 17, 1995, the Board wrote to Adelphia stating that it wished to withdraw its complaint in all of the communities, and gave Adelphia permission to file its withdrawal letter with the Commission.[1] The Board was the only complainant that filed a valid complaint with this Commission in each of the above-referenced communities.[2] Our jurisdiction to regulate CPS ratesarises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of this complaint, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9]

4. This Commission has now received from the Board a letter stating that it wishes to withdraw its CPS rate complaint against Adelphia. Under our rules, this Commission's authority to regulate CPS rates arises when a valid complaint against those rates is filed. In every community referenced above, the Board is the only complainant. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[10] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In its letter, in fact, the Board states that it has completed a rate review of the benchmark rates, and has found them consistent with the FCC's rules. It is on the basis of this finding, rather than on the basis of an underlying agreement to forebear, that the Board is seeking to withdraw its CPS rate complaint. We will accordingly allow the Board to withdraw its complaint. Because our review of the rate justification showings is predicated on the existence of a rate complaint, we are terminating our review of Adelphia's filings in the above-referenced communities.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaint against cable programming service rates in the above-noted communities

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[1] Letter from Celeste M. Fason, Board, to John Glicksman, Adelphia (Feb. 17, 1995); letter from John Glicksman, Adelphia, to Peter G. Wolfe, FCC (Feb. 22, 1995).

[2] The Board's complaint also includes four other communities in which it is not the only complainant. Because the Board's withdrawal of its complaint in these communities would not affect our review of Adelphia's rate justifications, we do not address these additional communities in this Order.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order):* 47 C.F.R. § 76.922(b).

[8] *See Benchmark Order,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] Conference Report on the Cable Act of 1992, at 62. *See also,* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5669 (1993) *(Rate Order).*

IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/ NEW HERITAGE STRATEGIC PARTNERS, L.P.,

Motion to Dismiss Appeal of the Local Rate Order Issued by the Ramsey/Washington Suburban Cable Commission

Birchwood Village, MN
Dellwood, MN
Grant Township, MN
Lake Elmo, MN
Mahtomedi, MN
Maplewood, MN
North St. Paul, MN
Oakdale, MN
Vadnais Heights, MN
White Bear Lake, MN
White Bear Townhip, MN
Willernie, MN

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

ORDER

Adopted: April 25, 1995; Released: April 27, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On June 13, 1994, Meredith/New Heritage Strategic Partners, L.P. ("Meredith"), the operator of a cable television system serving the Minnesota communities identified above, filed with the Commission an appeal of the local rate order adopted by Ramsey/Washington Suburban Cable Commission ("RWSCC"), on May 12, 1994. The local order established Meredith's rates for basic cable service, equipment, installations and hourly service charges, as allowed by the Cable Television Consumer Protection and Competition Act of 1992.

2. On April 7, 1995, Meredith filed with the Commission a motion to dismiss its earlier-filed appeal. In its motion, Meredith states that it no longer wishes to dispute RWSCC's rate order and requests that the Commission dismiss its appeal. There being no opposition, Meredith's motion to dismiss is granted.

II. ORDERING CLAUSE

3. Accordingly, IT IS ORDERED THAT Meredith's motion to dismiss its appeal of the local rate order issued by the Ramsey/Washington Suburban Cable Commision IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable dba Birmingham Cable Communications/ Bessemer Communications	CUID No. AL0125 (Birmingham, Alabama)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Time Warner Cable, dba Birmingham Communications/Bessemer Communications ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an gation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because its price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division,
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. NJ0015, Millville

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1995; Released: March 24, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was served on Operator on December 12, 1993 and was received by the Commission on December 21, 1993. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 on June 24, 1994 and a supplemental filing on February 6, 1995.[11]

5. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted rate for the CPS tier of $9.20 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Operator's actual monthly charge for its CPS tier was $9.48 (plus franchise fee). Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

6. Upon review of the record herein, we conclude that Operator's showing supports a maximum reasonable CPS tier price of $9.20 per month (plus franchise fee) for the period December 21, 1993 to May 14, 1994.[12] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] This finding is based solely on the representations of Operator listed in paragraph 5, *supra*. Should information come to our attention that these (representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the area referenced in the caption that portion of the amount paid for cable programming service for the period from December 21, 1993[13] to May 14, 1994 which exceeded $9.20 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $9.20 (plus franchise fee).

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cable of Beatrice — CUID Nos. KS0370 (Greenleaf) and KS0371 (Linn)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices TCI Cable of Beatrice ("TCI") was charging for its cable programming service ("CPS") tier in Greenleaf, Kansas, CUID No. KS0370 and Linn, Kansas, CUID No. KS0371, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In these cases, TCI's rate justifications indicate that as of September 1, 1993, it only offered one tier of service in Greenleaf, Kansas, CUID No. KS0370 and Linn, Kansas, CUID No. KS0371. The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's responses, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cable of Beatrice in Greenleaf, Kansas, CUID No. KS0370 and in Linn, Kansas, CUID No. KS0371, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division,
Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable — CUID Nos. TX0157 (Commerce)
TX0775 (Grape Vine)

Benchmark Filings to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Paragon Cable ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are lower than or equal to the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable CUID No. TX0242 (El Paso)

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Paragon Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable — CUID Nos. WI0453 (Brookfield), WI0455 (Muskego), WI0542 (Vernon)

Benchmark Filings to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Warner Cable ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lake County Cablevision — CUID No. FL0616, Umatilla

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Umatilla, Florida. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was served on Operator on February 28, 1994 and was received by the Commission on the same date. In response, Operator filed FCC Form 393 on May 31, 1994.

5. In its benchmark filing, Operator calculated a maximum permitted CPS rate of $14.35 per month (plus franchise fee). Operator's actual monthly charge for its CPS tier was $14.40 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's benchmark calculation for its regulated offerings as of September 30, 1992 (Part II, Worksheet 2, Line 220) is based upon 35 regulated channels and 26 satellite channels. We were able to verify the 35 regulated channels used for the benchmark calculation, but we were unable to verify Operator's count of 26 satellite channels. Based upon our review of Operator's channel line-up card, we reduced the number of satellite channels from 26 to 25. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Operator calculated the Inflation Adjustment Factor (Part II, Worksheet 1, Line 127) as of the end of March 1994 using data released by the U.S. Department of Commerce on December 1, 1993. However, Operator's use of March 1994 as the date through which it calculated the inflation adjustment is impermissible. Operator was required to file a justification of its CPS price for the Umatilla franchise area no later than March 30, 1994.[11] If Operator had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through February 1994.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[12] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole

Operator cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator should have filed.[13] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.039 as the Inflation Adjustment Factor through February 1994, the base date Operator should have used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing justifies a maximum reasonable CPS tier price of $14.20 per month (plus franchise fee) for the period February 28, 1994 to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Umatilla, Florida IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Umatilla, Florida that portion of the amount paid for cable programming service for the period from February 28, 1994[15] to May 14, 1994 which exceeded $14.20 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Umatilla, Florida, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $14.20 per month (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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months from September 30, 1992 to the date you will submit this form").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lake County Cablevision — CUID No. FL0065, Leesburg

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Leesburg, Florida. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was served on Operator on November 17, 1993 and received by the Commission on November 22, 1993. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted CPS rate of $14.32 per month (plus franchise fee). Operator's actual monthly charge for its CPS tier was $14.40 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's benchmark calculation for its regulated offerings as of September 30, 1992 (Part II, Worksheet 2, Line 220) is based upon 35 regulated channels and 26 satellite channels. We were able to verify the 35 regulated channels used for the benchmark calculation, but we were unable to verify Operator's count of 26 satellite channels. Based upon our review of Operator's channel line-up card, we reduced the number of satellite channels from 26 to 25. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Since Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[11] On its Form 393, Operator calculated the Inflation Adjustment Factor as of the end of November 1993 using data released on August 31, 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

figures, we calculate 1.032 as the Inflation Adjustment Factor through November 1993, the base date Operator used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing justifies a maximum reasonable CPS tier price of $14.29 per month (plus franchise fee) for the period from November 22, 1993 to May 14, 1994.[12]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Leesburg, Florida IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers that portion of the amount paid for cable programming service for the period from November 22, 1993[13] to May 14, 1994 which exceeded $14.29 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Leesburg, Florida, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $14.29 per month (plus franchise fee).[14]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[14] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SBC Media Ventures, Inc. CUID No. VA0108 (Arlington, VA)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("SBC Media Ventures") was charging for its cable programming service ("CPS") tier in the community designated above.[1] SBC Media Ventures has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of SBC Media Ventures' price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on SBC Media Ventures and received by the Commission on the dates set forth on Appendix A. SBC Media Ventures filed FCC Form 393 in response; SBC Media Ventures has also filed amended and supplemental Form 393 filings, most recently on March 7, 1995.

5. SBC Media Ventures asserts that its monthly CPS tier price of $13.83 is justified by its benchmark filing because its price is equal to the maximum permitted charge as calculated in the filing. However, SBC Media Ventures' actual monthly CPS tier price, exclusive of franchise fees, was $15.98.[12] Upon review of SBC Media Ventures' Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to SBC Media Ventures' calculations in Form 393:

a. In reporting its customer equipment and installation costs on Form 393, Part II, Worksheet 3, Line 301, SBC Media Ventures did not correctly gross-up its tax entries.[13] SBC Media Ventures' Form 1205 filing confirms that it is a tax-paying entity (i.e., a "C" corporation). However, SBC Media Ventures incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in calculating

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[1] SBC Media Ventures, Inc. purchased the system addressed in this Order from Arlington Cable Partners on January 6, 1994. As required by the context, the term "SBC Media Ventures" as used herein includes Arlington Cable Partners.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent SBC Media Ventures has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which SBC Media Ventures implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in SBC Media Ventures' price for the period after May 14, 1994 may be required to reflect the fact that SBC Media Ventures' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] *See* letter from George Psillos, Vice President Finance and Administration, SBC Media Ventures, Inc. to Austin O Connor, FCC (March 6, 1995).

[13] An operator's customer equipment and installation costs are calculated on Part III of Form 393. However, SBC Media Ventures did not complete Part III of the Form 393 that it supplied to the Commission. Using the figures supplied by SBC Media Ventures on Form 1205, we were able to verify the accuracy of SBC Media Ventures' Line 301 entry subject to the tax adjustment described in the text.

their customer equipment and installation costs. (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPSprice. We therefore recalculate Line 301 (and Form 393, Part II, Worksheet 1, Line 104) using correctly grossed-up tax entries.

b. In Line 101, Columns A and B of Part II, Worksheet 1 of its FCC Form 393, SBC Media Ventures used different rates than those on the rate card that it supplied with its filings. Pursuant to the instructions on Form 393, SBC Media Ventures should have used its actual rates that were in effect on the initial date of regulation. We therefore recalculate line 101, Columns A and B (and subsequent steps) using the prices for the basic and CPS tiers found in the rate card.

c. SBC Media Ventures' calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count channel 8 (News Channel 8) as a satellite channel. However, News Channel 8 should not have been counted as a satellite channel because it is not delivered on a communications satellite.[15] We therefore reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 31 to 30.

d. Because of these errors, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, SBC Media Ventures calculated the Inflation Adjustment Factor using data it relied on when it set its CPS price. If based on this data Form 393 indicated that SBC Media Ventures' price was reasonable, then it would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[16] However, SBC Media Ventures has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that it timely filed Form 393.[17] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993 for CUID No. VA0108.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that SBC Media Ventures has failed to justify the rate it was charging during the period in question. SBC Media Ventures' showing justifies the maximum reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[18]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by SBC Media Ventures, Inc. in the area referenced in the caption and at Appendix A herein, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that SBC Media Ventures, Inc. shall refund to subscribers in the community shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[19] to May 14, 1994 which exceeded the maximum price set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that SBC Media Ventures, Inc. shall promptly determine the overcharges to CPS subscribers for thestated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

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[14] First Order of Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entiries to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[15] The Form 393 instructions, page 11, state:

> For purposes of using the benchmark tables, a "satellite-delivered signal" is any cable program service or "superstation" delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel). If a cable system picks up a satellite channel via a microwave or fiber optic feed, the channel remains a satellite channel if it is available by satellite unless it could be picked up directly over-the-air in the cable community.

[16] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[18] This finding is based solely on the representations of SBC Media Ventures and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that SBC Media Ventures, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix B (plus franchise fee).[20]

11. IT IS FURTHER ORDERED that SBC Media Ventures, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
VA0108	10/25/93	10/22/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
VA0108	$15.98	$13.69

[20] We reserve the right to make further adjustments to SBC Media Ventures' price for the period after May 14, 1994, upon completion of our review of SBC Media Ventures' Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Post-Newsweek Cable, Inc. — CUID No. TX0045 (Odessa, TX)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 2, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Post-Newsweek") was charging for its cable programming service ("CPS") tier in the community designated above. Post-Newsweek has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Post-Newsweek's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Post-Newsweek and received by the Commission on the dates set forth on Appendix A. Post-Newsweek filed FCC Form 393 in response on November 15, 1993.

5. Post-Newsweek asserts that its monthly CPS tier price is justified by its benchmark filing because its price is equal to the maximum permitted charge as calculated in the filing. Upon review of Post-Newsweek's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Post-Newsweek's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Post-Newsweek did not correctly gross-up its tax entries. By placing entries in these columns, Post-Newsweek confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Post-Newsweek incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Post-Newsweek has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Post-Newsweek's price for the period after May 14, 1994 may be required to reflect the fact that Post-Newsweek's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In Line 101, Columns A and B of Part II, Worksheet 1 of its FCC Forms 393, Post-Newsweek used different rates than those on the rate cards that it supplied with its filing. Pursuant to the instructions on Form 393, Post-Newsweek should have used its actual rates that were in effect on the initial date of regulation. We therefore recalculate line 101, Columns A and B (and subsequent steps) using the prices for the basic and CPS tiers found in the rate card.

c. Post-Newsweek's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Post-Newsweek restructured its rates, including its equipment rates, on September 1, 1993, the monthly equipment revenue figure it entered on Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Line 34 of Step G of Part III.[12] However, Post-Newsweek's entries on these two lines varied substantially. Accordingly, we have changed Line 104 to equal the figure entered on Line 34, as adjusted pursuant to paragraph 5a, *supra*.

d. Because of these errors, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, Post-Newsweek calculated the Inflation Adjustment Factor using data it relied on when it set its CPS price. If based on this data Form 393 indicated that Post-Newsweek's price was reasonable, then Post-Newsweek would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[13] However, Post-Newsweek has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Post-Newsweek timely filed Form 393.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993 for CUID No. TX0045.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Post-Newsweek has failed to justify the rate it was charging during the period in question. Post-Newsweek's showing justifies the maximum reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by Post-Newsweek Cable, Inc. in the area referenced in the caption and at Appendix A herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Post-Newsweek Cable, Inc. shall refund to subscribers in the community shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Post-Newsweek Cable, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Post-Newsweek Cable, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix B (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Post-Newsweek Cable, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

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[12] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[15] This finding is based solely on the representations of Post-Newsweek and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Post-Newsweek Cable, Inc.'s price for the period after May 14, 1994, upon completion of our review of Post-Newsweek Cable, Inc.'s Form 1200 filing.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
TX0045	10/14/93	10/08/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
TX0045	$15.47	$15.35

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Northland Cable Properties Seven Limited Partnership	CUID Nos. TX0190 (Brenham) TX1412 (Washington County)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the datesP set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator also filed amended and supplemental Form 393 filings on April 13, 1995.

5. Operator asserts that its monthly prices for the first CPS tier (Tier 2) are justified by its benchmark filings because its prices for that tier are lower than the maximum permitted charges as calculated in the filings. Operator concedes that its prices for the second CPS tier (Tier 3) are unreasonable because they are significantly higher than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> In its amended FCC Form 393 filings, Operator calculated its Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of April 1995 using data released by the U.S. Department of Commerce on August 31, 1993. However, Operator's use of April 1995 as the date through which it calculated the inflation adjustment is impermissible. Operator was required to file a justification of its CPS prices for the Brenham franchise area by no later than November 15, 1993 and for the Washington County franchise area by no later than November 21, 1993.[11] Since Operator filed its initial justifications in a timely fashion, the instructions to Form 393 required it to calculate the inflation adjustment only through October 1993.[12] Operator cannot be permitted to

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[12] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

claim an additional inflation adjustment simply because it subsequently filed revised Forms 393. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator timely filed its initial FCC Form 393 in each franchise area.[13] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993 for both franchise areas addressed in this Order.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum prices for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tiers 2 and 3 (Lines A6b and A6c) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
TX0190	10/26/93	10/21/93
TX1412	10/15/93	10/13/93

Appendix B

CUID No.	Tier	Actual Rates	Maximum Permitted Rates
TX0190	2	$10.68	$10.31
	3	$ 6.80	$ 2.21
TX1412	2	$11.00	$10.75
	3	$ 7.00	$ 2.30

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner	CUID Nos. WI0330 (Whitefish Bay)
Cable	WI0331 (Brown Deer)
	WI0332 (Shorewood)
	WI0337 (Glendale)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Warner Cable ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filings because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICABLE INTERNATIONAL - INDIANA, INC.

Petition for Reconsideration

of the Certification of
Town of Albany, Indiana
to Regulate Basic Cable Rates
(IN0151)

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 22, 1993, Americable International - Indiana, Inc. ("Americable") filed a timely petition for reconsideration challenging the certification of the Town of Albany; Indiana ("the Town") to regulate rates for basic cable service and associated equipment.[1] The Town did not file an opposition to Americable's petition. On December 14, 1993 Americable filed a supplement to its petition. In addition, both parties submitted information in response to Bureau staff requests regarding the current status of rate regulation in the Town.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] To qualify for certification, a franchising authority must confirm that it has the legal authority and personnel to regulate rates, that it will adopt and administer regulations that are consistent with the Commission's rules, and that interested parties will be provided with a reasonable opportunity to comment during rate proceedings.[4] Certification becomes effective 30 days from the date of filing of the certification unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6]

II. DISCUSSION

3. Americable alleges that the Town fails to meet the certification standards set forth in Section 623 of the Communications Act of 1934, as amended.[7] Specifically, Americable argues that the Town has adopted cable rate regulations that are inconsistent with the regulations prescribed by the Commission. Americable contends that Town Ordinance Number 1993-19, which authorizes the Town to adopt the cable television rate regulations as established by the Federal Communications Commission, has four defects which are inconsistent with the Commission's regulations.[8] First, Americable argues that the Town's ordinance contains tolling provisions in excess of those permitted by the Commission's regulations. Specifically, Americable alleges that the Town's ordinance not only allows the Town an initial 30-day period of review from the date the cable operator submits a cost-of-service showing with its schedule of rates, but that it also allows the Town to toll the initial period for 240 more days. Second, Americable claims the Town's ordinance provides for the ordering of refunds even where the cable operator may have justified its costs pursuant to a cost-of-service showing under the Commission's regulations. Third, Americable alleges that the Town's ordinance fails to provide the one year limitation for refund liability which is set forth in the Commission's rules. Finally, Americable argues that the Town's ordinance fails to provide for notice and opportunity to comment by the cable operator, prior to the issuance of a refund order. As support for its factual contentions, Americable submits a copy of Ordinance Number 1993-19.

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[1] The Town filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 28, 1993. The certification became effective on November 27, 1993.

[2] *See* Letter dated February 24, 1995 from Mr. James E. Meyers, Attorney for Americable International - Indiana, Inc. to Mr. Rodney L. McDonald, Attorney Advisor, Cable Services Bureau; Letter dated February 27, 1995 from Mr. William J. Conn, Town of Albany Clerk/Treasurer to Mr. Rodney L. McDonald, Attorney Advisor, Cable Services Bureau.

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] Communications Act of 1934 § 623(a)(3), 47 U.S.C. § 543(a)(3); 47 C.F.R. § 76.910(b).

[5] 47 C.F.R. § 76.910(e).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] In its petition, Americable also argued that its system had fewer than 1,000 subscribers, and that it therefore qualified under the Commission's temporary stay of rate regulation for small systems which was then in effect. *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5585 (1993). Americable argued that the Commission implemented the temporary stay of rate regulation in order to reduce the administrative burdens and costs of compliance for systems with fewer than 1,000 subscribers. Americable argued that in light of this temporary stay, the Town's certification should be stayed with regard to Americable's system. In a letter dated July 19, 1994, the Cable Services Bureau notified Americable that this temporary stay of rate regulation had been lifted as of May 15, 1994 by an order adopted on February 22, 1994. *See Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) (*"Second Recon. Order"*). Therefore, this argument is now moot.

[8] The relevant sections of the Commission's regulations are 47 C.F.R. §§ 76.933 and 76.942.

4. We will address Americable's arguments in inverse order. First, we find that Americable's argument that the Town's ordinance inappropriately fails to require a specific notice and comment period prior to the issuance of a refund order lacks merit. Section 76.942(a) of the Commission's rules requires franchising authorities to give an operator notice and an opportunity to comment prior to issuing a refund order.[9] The Town's ordinance does not include a specific provision requiring such notice and opportunity to comment. Section 7 of the Town's ordinance simply provides in relevant part as follows:

> The Town may order the cable operator to refund to subscribers a portion of previously paid rates under the following circumstances: A. A portion of the previously paid rates have been determined to be in excess of the permitted basic cable service tier charge or above the actual cost of equipment; or B. The cable operator has failed to comply with a valid rate order issued by the Town.[10]

However, a local franchising authority is not required to specifically adopt in writing each and every rate provision promulgated by the Commission in order to comply with the certification provisions of the Communications Act of 1934, as amended. As the Commission stated previously, in order to adopt regulations consistent with those promulgated by the Commission, it is sufficient for a franchising authority to adopt a rule "stating that the local franchising authority will follow the rate regulations promulgated by this Commission."[11] The Town's ordinance does contain such a provision. Section 1 of the Town's Ordinance states in relevant part as follows:

> A. That the Town Council and Council members hereby adopt the rules and regulations set forth by the Federal Communications Commission pursuant to Section 623(b) of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. [§] 543(b)) for the review of the basic service tier of cable television services and equipment necessary for the provision of such service tier. Such rules and regulations promulgated by the Federal Communications Commission are found in Exhibit A attached hereto.[12]

Moreover, we note that both parties acknowledge that the Town has not commenced regulation of Americable's basic rates.[13] Specifically, Americable has not submitted any rate justification forms,[14] and consequently, the Town has neither had an opportunity to review Americable's rates nor issue a rate order.[15] When the Town commences regulation of Americable's rates, it must act, under its ordinance, in accordance with its rules and those of the Commission. In accordance with these rules, the Town will be required to provide cable operators with notice and an opportunity to comment before ordering a refund order. Accordingly, we find that the absence of a specific notice and opportunity to comment provision in the Town's ordinance is not grounds for rescission of the Town's certification in this case.

5. For the same reasons, we do not believe that the failure of the Town's ordinance to include a specific provision limiting refunds to one year constitutes grounds for the rescission of the Town's certification. As noted above, the Town's own rules require it to follow the rules set forth by the Commission "for the review of the basic service tier of cable television services and quipment necessary for the provision of such service tier."[16] The Town has also not commenced rate regulation[17] and, therefore, there is no evidence that the Town has or will act in a manner that is inconsistent with the Commission's rules with respect to ordering rate refunds. Accordingly, we find that Americable's arguments on this issue lack merit.

6. Next, we do not believe that the Town's ordinance impermissibly allows for refunds to be ordered where a cable operator has justified its rates through a cost-of-service showing, as Americable asserts. Americable's allegation is again based on the language contained in Section 7 of the Town's ordinance.[18] However, there is nothing in this provision which states that the Town may order refunds even though a cable operator has permissibly justified its rates through a cost-of-service showing. Moreover, Americable points to nothing in any other section of the ordinance which allows the Town to take such action. Accordingly, we find that this argument also lacks merit.

7. Finally, we address Americable's argument that the Town's certification should be rescinded due to its adoption of rules that are inconsistent with those of the Commission with regard to the period of review for cost of service cases. While Section 1 of the Town's ordinance demonstrates the Town's clear intent to adopt cable rate regulations consistent with those of the Commission, Section 4 of the Town's ordinance incorrectly states the time period allowed for review of cost-of-service cases by the franchising authority. Section 4 of the Town's Ordinance states in relevant part as follows:

> A. That the Town of Albany, Delaware County, Indiana, shall establish that the period for review of the basic service tier of cable television services and the equipment necessary to provide said basic tier of service shall be ninety (90) days from the submission by the grantee of information and forms prescribed by the Federal Communications Commission for a showing of cost-of-service, as defined by the Federal Communications Commission. B. In the event that additional time for review of the cost-of-service showing submitted by the grantee is necessary, the Town of Albany or their designee shall issue a brief written order prior to the end of the ninety (90) day review period with a copy of said order to be sent by Certified

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[9] 47 C.F.R. § 76.942(a).
[10] Town of Albany, Ind., Ordinance No. 1993-19, § 7 (1993).
[11] *Rate Order, supra*, at n.238.
[12] Town of Albany, Ind., Ordinance No. 1993-19, § 1 (1993).
[13] *See* footnote 2.
[14] *See* 47 C.F.R. § 76.930 (initiation of review of basic cable service and equipment rates).
[15] *See* footnote 2.
[16] *See* Town of Albany, Ind., Ordinance No. 1993-19, § 1 (1993).
[17] *See* footnote 2.
[18] *See* Town of Albany, Ind., Ordinance No. 1993-19, § 7 (1993).

United States Mail to the grantee, providing for an additional one hundred fifty (150) day period for review of rates of the basic service tier and the equipment necessary to provide said basic tier of service. During the extended review period and before taking action on the proposed rate, the Town Council shall hold at least one public hearing in which interested citizens may express their views and record objections.[19] On the other hand, Section 76.933(a) of the Commission's rules provides for an initial 30-day period for review of rate justifications submitted to the franchising authority.[20] This period may be tolled for either an additional 90 days in cases not involving cost-of-service showings, or an additional 150 days in cases involving cost-of-service showings.[21] We note that the initial 90-day period of review for cost-of-service cases referred to in Section 4 of the Town's ordinance is inconsistent with the initial period allowed under our rules. This reference in Section 4 is also inconsistent with the Town's stated intent to adopt regulations that are consistent with those of the Commission. Nonetheless, we do not believe that the Town's certification should be rescinded in this case. First, the Town has indicated that it intended to adopt rules that are consistent with those of the Commission. Second, we note that Americable has not been harmed by this inconsistency as the Town has not initiated rate regulation (*i.e.*, Americable has not submitted rate justification forms and the Town has not commenced any review proceedings of Americable's rates). As such, the Town has not administered its rules in a manner that is inconsistent with our rules, and it will not have an opportunity to do so until rate regulation is initiated. Accordingly, we do not believe that rescinding the Town's certification would be justified at this time. We do, however, note that the Town should correct the inconsistency in Section 4 of its ordinance before rate regulation is initiated. Should the Town fail to correct the inconsistency before initiating rate regulation, Americable may then file a petition for revocation based on the Town's failure to adopt and administer regulations that are consistent with those of the Commission.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Americable International - Indiana, Inc., challenging the certification of the Town of Albany, Indiana to regulate Americable's basic cable service rates IS DENIED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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19 Town of Albany, Ind., Ordinance No. 1993-19, § 4 (1993).
20 47 C.F.R. § 76.933(a).
21 47 C.F.R. § 76.933(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

York Cable Television, Inc. CUID No. PA0784
(Springettsbury Township)

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1995; Released: May 9, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price York Cable Television, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CMA Cablevision Associates V, L.P. — CUID No. PA1392 (Borough of Mifflinburg)

d/b/a Tele-Media Cable

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1995; Released: May 9, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Tele-Media Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Battlefield Cable Company — CUID No. GA0068, Fort Oglethorpe

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995; Released: May 9, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Fort Oglethorpe, Georgia. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS price upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS price.[3] Under our rules, an operator may attempt to justify its price through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS price are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS price were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their price were in compliance with the revised rules from May 15, 1994 forward.[8] Operator is attempting to justify their price for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their price for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first complete and timely complaint was served on Operator on September 15, 1993 and received by the Commission on September 20, 1993. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted CPS rate of $12.07 per month (plus franchise fee). Operator's actual monthly charge for its CPS tier was $12.46 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> On its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of January 1994. However, Operator cannot permissibly calculate inflation through the end of January 1994. Based on the service date of the earliest valid complaint, Operator was required to file a rate justification no later than November 15, 1993. If Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[11] Operator cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[12] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), as *amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator's showing justifies a maximum reasonable CPS tier price of $11.95 per month (plus franchise fee) for the period from September 20, 1993 to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in Fort Oglethorpe, Georgia, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Fort Oglethorpe, Georgia that portion of the amount paid for cable programming service for the period from September 20, 1993[14] to May 14, 1994 which exceeded $11.95 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Fort Oglethorpe, Georgia for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $11.95 (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Operator and the modification described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

VERMONT TELEPHONE COMPANY, INC. File No. CRD-95-3

For Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934, as amended

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1995; Released: May 9, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On February 3, 1995, Vermont Telephone Company, Inc. ("VTC") requested a Declaratory Ruling pursuant to Section 1.2 of the Commission's rules[1] that, consistent with the public interest, Mr. Noel Bambrough, a Canadian citizen, may serve on the board of directors of VTC's parent company, Vermont National Telephone Company, Inc. ("Vermont National"). In addition, VTC seeks approval to appoint Messrs. Bambrough and Switzer (also a Canadian citizen) as senior vice presidents of Vermont National. Currently, all of the officers of Vermont National are United States citizens, and one of the four directors is a Canadian citizen. If the subject appointments are approved, two officers and two directors of Vermont National, the parent of the licensee, would be Canadian citizens.[2] Vermont National controls, but does not directly hold, a wireless narrowband commercial radio (*i.e.*, paging) station, KCC 788 in Springfield, Vermont. VTC further represents that as officers and directors of Vermont National, Messrs. Bambrough and Switzer will not be involved in the day-to-day management of the station and will have no control or oversight of this or any other licensed facilities. The request for declaratory ruling was placed on public notice on February 22, 1995. *See Public Notice*, DA 95-336 (released February 22, 1995). No comments were filed in response to the public notice.

2. Under Section 310(b)(4) of the Communications Act of 1934, as amended, ("the Act"), a station license may not be held by:

> any corporation directly or indirectly controlled by any other corporation of which any (officer . . . [is an] alien . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

3. By its express language, the benchmarks established in Section 310(b)(4) apply to entities such as VTC which directly or indirectly control licensees. The restrictions in Section 310(b)(4) of the Act reflect national security concerns and are designed to guard against foreign influence by limiting aliens' participation in certain domestic radio activities. *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4)*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner); Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 298 (1991) (*citing Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959)). Nevertheless, the statute permits licensing of a corporation controlled by another corporation which employs an alien officer where it is not contrary to the public interest. *See Continental Illinois Venture Corp.*, 6 FCC Rcd 1944 (Mobile Serv. Div., CCB 1991). In addition, the Commission has considered the nationality of an alien, *i.e.*, whether the alien is from a country that has historically had friendly relations with the United States. *See Data General Corp.*, 2 FCC Rcd 6060 (Com. Car. Bur. 1987); *GCI Liquidating Trust*, 7 FCC Rcd 7641 (Com. Car. Bur. 1992).

4. In previous cases, the Commission has found that the public interest would not be adversely served where an alien officer had no control or supervision of licensee corporations. *See Xerox Corporation*, 74 FCC 2d 471 (1979); *International Telephone and Telegraph Corp.*, 67 FCC 2d 604 (1978). Accordingly, in view of VTC's representations that Messrs. Bambrough and Switzer will not be involved in the day-to-day operation of the subject paging station and will have no control or oversight of any licensed facilities, we do not find that Mr. Bambrough's participation as a director and senior vice president of Vermont National, and Mr. Switzers' participation as a senior vice president of Vermont National would be inconsistent with the Act or the public interest.

5. Accordingly, IT IS ORDERED that the Petition for Declaratory Ruling filed on February 3, 1995, by Vermont Telephone Company, Inc. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[1] 47 C.F.R. § 1.2

[2] Allowing foreign nationals to hold two of the four director positions would bring the precentage of directors in Vermont National over the one fourth limit on foreign ownership allowed under the satute. 47 U.S.C. § 310(b). We must therefore determine whether we will allow the additional foreign director.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MORGAN STANLEY GROUP, INC. File No. CRD-95-1

For Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934, as amended

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1995; Released: May 10, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On December 21, 1994, Morgan Stanley Group Inc. ("MSG") filed a Petition for Declaratory Ruling pursuant to Section 1.2 of the Commission's rules[1] that, consistent with the public interest, Sir David Walker, a citizen of the United Kingdom, may serve as a corporate officer of MSG. MSG asserts that Sir Walker, as Managing Director, will not exercise control of any Federal Communications Commission licensed facility. MSG controls, but does not directly hold, Commission common carrier licenses. We find that Sir Walker's appointment as a corporate officer of MSG is consistent with public interest and we accordingly grant the petition for declaratory ruling. The request for declaratory ruling was placed on public notice on February 13, 1995. *See Public Notice*, DA 95-226 (released Feb. 13, 1995). No comments were filed in response to the public notice.

2. Under Section 310(b)(4) of the Communications Act of 1934 as amended, ("the Act"), a station license may not be held by:

> any corporation directly or indirectly controlled by any other corporation of which any (officer . . . [is an] alien . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

3. By its express language, the benchmarks established in Section 310(b)(4) apply to entities such as MSG which directly or indirectly control licensees. The restrictions in Section 310(b)(4) of the Act reflect national security concerns and are designed to guard against foreign influence by limiting aliens' participation in certain domestic radio activities. *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4)*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner); Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 298 (1991) (*citing* Noe v. FCC, 260 F.2d 739, 741 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959)). Nevertheless, the statute permits licensing of a corporation controlled by another corporation which employs an alien officer where it is not contrary to the public interest. *See Continental Illinois Venture Corp.*, 6 FCC Rcd 1944 (Mobile Serv. Div., CCB 1991). In addition, the Commission has considered the fact that the United Kingdom is a United States ally, and shares a common language and heritage with the United States, in finding that the presence of an alien officer is not contrary to the public interest. *See Data General Corp.*, 2 FCC Rcd 6060 (Com. Car. Bur. 1987); *GCI Liquidating Trust*, 7 FCC Rcd 7641 (Com. Car. Bur. 1992).

4. In previous cases, the Commission has found that the public interest would not be adversely served where an alien officer had no control or supervision of licensee corporations. *See Xerox Corporation*, 74 FCC 2d 471 (1979); *International Telephone and Telegraph Corp.*, 67 FCC 2d 604 (1978). Accordingly, in view of MSG's representations that Sir Walker will have no control or oversight of any licensed facilities of any MSG subsidiary (or partnership controlled by an MSG subsidiary) that now holds or may in the future hold common carrier or broadcast licenses, we do not find that Sir Walker's participation as a corporate officer of MSG would be inconsistent with the Act or the public interest.

5. Accordingly, IT IS ORDERED that the Petition for Declaratory Ruling filed on December 21, 1994, by Morgan Stanley Group, Inc. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[1] 47 C.F.R. § 1.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hughes Communications Galaxy, Inc. — File No. DBS 84-02/89-SAT-STA-95

Application for Special Temporary Authority for the DBS-2A Direct Broadcast Satellite

ORDER

Adopted: May 18, 1995; Released: May 19, 1995

By the Chief, Satellite and Radiocommunication Division:

1. By this Order, we grant Hughes Communications Galaxy, Inc.'s (Hughes') unopposed request for special temporary authority (STA) to operate its DBS-2A direct broadcast satellite at 110^0 W.L. for an eight-week period, commencing upon launch, to test the satellite. Hughes is currently authorized to launch DBS-2A for co-location with its second direct broadcast satellite, DBS-2, which is providing Direct Broadcast Satellite (DBS) service at the 100.8^0 W.L. orbital location.[1] Grant of this STA request will permit Hughes to conduct an in-orbit test of DBS-2A without disrupting its existing DBS service.

2. Hughes states that a thorough in-orbit test of DBS-2A requires that the satellite initially be positioned several degrees away from DBS-2 to prevent interference to DBS-2 operations. Hughes anticipates that this testing process will take no longer than eight weeks. It indicates that the satellite will then be positioned at 100.85^0 W.L. to commence operations.

3. Granting the Hughes request will serve the public interest, convenience and necessity. Testing DBS-2A at 110^0 W.L. will allow Hughes to continue to deliver programming to its subscribers from its DBS-1 and DBS-2 satellites. In addition, Hughes states that the proposed test will not cause harmful interference to satellites in the vicinity of 110^0 W.L. It states further that the DBS-2A communications repeater will be inactive during repositioning from 110^0 W.L. to 100.8^0 W.L. No other DBS operator has commented about Hughes' interference assessment. We therefore grant this request.

4. Accordingly, pursuant to authority delegated by Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, IT IS ORDERED that Application File No. DBS 84-02/89-SAT-STA-95 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to test DBS-2A at the 110^0 W.L. orbital location for an eight week period after the satellite is launched. At the expiration of this period, DBS-2A must be moved to its assigned location of 100.8^0 W.L.

5. IT IS FURTHER ORDERED that no harmful interference shall be caused to any other lawfully operated radio station and Hughes Communications Galaxy, Inc. shall cease operation immediately upon notification of such interference.

6. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. shall notify the Commission in writing no later than seven days after the testing of DBS-2A is completed.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and Radiocommunication Division
International Bureau

[1] *Hughes Communications Galaxy, Inc.*, _____ F.C.C. Rcd. _____ (International Bureau, DA 95-979, issued May 1, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY SOUTHWEST CABLE TV
BEVERLY HILLS, CALIFORNIA

Appeal of Local
Rate Order of City of
Beverly Hills, California

ORDER

Adopted: May 19, 1995; Released: May 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 8, 1994, Century Southwest Cable Television Corporation ("Century") filed with the Commission a Petition for Review of Rate Order ("appeal") of the local rate order ("local order") adopted on March 8, 1994 by the City of Beverly Hills, California (the "City").[1] In its local order, the City established Century's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tier rates, the City found Century's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of the local order. The City incorporated into its local order the findings of an independent consulting firm and an independent certified public accounting firm hired by the City to review Century's Form 393 submission. In its local order, the City ordered Century to make refunds to subscribers for all payments made in excess of the rates set forth in the local order since September 1, 1993.[3]

2. Also on April 8, 1994, in addition to its appeal of the local order, Century filed an Emergency Petition for a Stay of Enforcement Pending Review. We granted the petition for stay pending resolution of the proper regulatory treatment to be accorded Century's a la carte package.[4] Subsequently, on our own motion, we amended that decision to stay the local order pending our resolution of Century's appeal.[5]

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[6] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[9] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings" and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[10]

II. DISCUSSION

4. In its appeal, Century challenges the local order on two grounds. First, Century alleges that the City has erroneously prescribed a rate for a third type of converter which Century claimed it did not offer to subscribers. In its Reply, Century remains critical of the rate established for the third converter by the City but offers to accept it until

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[1] On April 26, 1994, the City filed a Request To Submit Late Filing and Opposition of City of Beverly Hills to Emergency Petition for a Stay. On May 2, 1994, the City filed its Response Of City of Beverly Hills to Petition for Review of Rate Order ("Response"). On May 9, 1994, Century filed its Reply ("Reply") to the City's Response. Since Century has not opposed the City's request to accept its late-filed Response and has replied to that Response, we will grant the City's request and accept the late-filed Response. We note that the City's Response and Century's Reply are central to resolution of the issues involving Century's third type of converter.

[2] *See* Petition, Exhibit A, Resolution of the Council of the City of Beverly Hills, California, Resolution 94-R-8898, adopted March 8, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] *See Order* (Petition for Stay of Local Rate Order adopted by the City of Beverly Hills, CA.), DA 94-463, (Cab. Serv. Bur., released May 9, 1994).

[5] *See Order* (Petition for Stay of Local Rate Order of the City of Beverly Hills, CA.), DA 94-1296, (Cab. Serv. Bur., released November 22, 1994).

[6] 47 C.F.R. § 76.944.

[7] *Rate Order*, 8 FCC Rcd at 5731; *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[8] *Id.*

[9] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[10] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

such time as Century files its revised FCC Form 1205.[11] Because Century now accepts the rate prescribed by the City for the third converter, this issue is no longer in controversy.

5. Second, Century argues that the City exceeded its authority in determining that its a la carte services should be treated as regulated channels. Century argues that the City applied the wrong legal standard when it relied on the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of Century's a la carte channels and unfairly gave "retroactive effect" to these guidelines.[12] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that Century's package should be treated as a regulated tier.

6. The Century a la carte services at issue were first offered to subscribers on September 1, 1993, when Century restructured the service offerings on its Beverly Hills system. Century's restructuring involved offering twelve channels, two from the basic service tier and ten from the cable programming services tier, on an individual basis and also as a package that Century alleges is not subject to rate regulation.[13]

7. The facts presented in this appeal are the same as the facts presented in one of our letter of inquiry orders, *Century Southwest Cable TV, Beverly Hills and Los Angeles, California,* LOI-93-17, (Cab. Serv. Bur., released December 22, 1994) (*"Century Southwest"),* in which we resolved the regulatory status of Century's a la carte services in this franchise area. In *Century Southwest,* we found that Century's retiering on its Beverly Hills system constituted an evasion of rate regulation. We therefore found that Century's a la carte package must be treated as a rate-regulated cable programming services tier and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of September 1, 1993. Our findings in *Century Southwest* are consistent with the City's conclusion that the channels in Century's a la carte package must be included as regulated channels. Accordingly, Century's appeal with respect to this issue is denied.

8. On January 23, 1995, Century filed an Application for Review ("Application") with the Commission of our letter of inquiry decision in *Century Southwes.*[14] Since Century's Application is pending and since the exact issue addressed in this Order is the subject of that Application, we have decided to issue, on our own motion, a stay of the effective date of this Order until the Commission releases a decision on Century's Application in *Century Southwest* regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles.[15] In addition, we are amending, also on our own motion, the stay we had previously issued in this proceeding.[16] That stay is hereby extended until the Commission releases a decision on Century's Application in *Century Southwest.*

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that Century's appeal of the local order of the City of Beverly Hills, with respect to the regulatory status of Century's a la carte package, is DENIED.

10. IT IS FURTHER ORDERED, on our own motion, that the effective date of this Order is STAYED pending resolution of Century's Application for Review of the Bureau's letter of inquiry decision in *Century Southwest Cable TV, Beverly Hills and Los Angeles, California,* LOI-93-17 (Cab. Serv. Bur., released December 22, 1994).

11. IT IS FURTHER ORDERED, on our own motion, that the stay of the local rate order which we granted in *Century Southwest Cable Corp.* (Beverly Hills, CA), DA 94-463 (Cab. Serv. Bur., released November 22, 1994), is hereby EXTENDED until the Commission releases a decision on Century's Application for Review in *Century Southwest Cable TV, Beverly Hills and Los Angeles, California,* LOI-93-17 (Cab. Serv. Bur., released December 22, 1994).

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] Cable operators use FCC Form 1205 to calculate permitted costs associated with regulated equipment and installation for the basic service tier.

[12] Petition at 2-3; *See also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Second Order on Reconsideration, Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4214 (1994) (*"Second Reconsideration Order"*).

[13] *See* Response at 2.

[14] *See* Application for Review of LOI 93-17, Century Southwest Cable TV, Beverly Hills and Los Angeles, California, filed January 23, 1995.

[15] *Id.*

[16] *See Order* (Petition for Stay of Local Rate Order adopted by the City of Beverly Hills, CA), DA 94-463 (Cab. Serv. Bur., released November 22, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

	Los Osos, CA (CA0680)
FALCON CABLE	Garden Farms, CA (CA0706)
SYSTEMS COMPANY	Santa Margarita, CA (CA0707)
Appeal of Local Rate Order of	Cambria, CA (CA0709)
San Luis Obispo County, CA	Templeton, CA (CA0927)

ORDER

Adopted: May 19, 1995; Released: May 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 23, 1995, Falcon Cable Systems Company ("Falcon"), the franchisee in the above matter filed an appeal of a local rate order adopted on January 24, 1995 by its franchising authority, San Luis Obispo County, California (the "County").[1] The local order established regulated rates for Falcon's basic cable service, associated equipment and installation charges, and required Falcon to issue refunds for the period July 14, 1994 to November 30, 1994. The County submitted an opposition to the appeal on March 8, 1995, and Falcon filed a reply on March 22, 1995.[2]

2. In its review of Falcon's Forms 1200, 1205, 1215, and 1210, the County approved Falcon's permitted rates for its basic service tier, but found that Falcon could not implement the rate increase justified by Falcon's Form 1210 until December 1, 1994. Consequently, the County ordered a refund of the amount of the difference between the basic tier rate justified under Falcon's Form 1200, $14.17, and the amount it charged prior to approval of the Form 1210, $15.72, for the period July 14, 1994 until November 30, 1994. Falcon argues that it restructured its rates on July 14, 1994 and that the Commission's rules permitted an operator to do so at that time without prior approval, and that these rates were subsequently justified in Falcon's Form 1210 filing. In its opposition, the County contends the issue is not whether prior approval was necessary, but whether Falcon's July 14, 1994 rates could reflect cost increases that did not occur until after June 30, 1994. The County argues that since the cost increases for which Falcon filed did not take place until after June 30, 1994, Falcon was not permitted to file for those cost increases until after September 30, 1994 under the Commission's procedures. The County further argues that Falcon was not permitted to implement the rate increase until it was approved.

II. BACKGROUND

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

4. FCC Form 1210 is the official form an operator uses to justify adjustments in the rates it computed on its FCC Form 1200, which is used to establish an operator's initial maximum permitted rates, or on a previously filed Form 1210.[7] In the Form 1200, an operator calculates its provisional rates and its full reduction rates. An operator's initial maximum permitted rates are the higher of the two. An operator may file a Form 1210 to adjust its rates to reflect changes in external costs, channel additions and deletions, and inflation.[8] External costs include the following categories of costs: state and local taxes specifically applicable to the provision of cable television service; franchise fees; costs of complying with franchise requirements; retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; other programming costs; and Commission regulatory fees.[9] An operator may file for changes in external costs for the period beginning at the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the Form 1210.[10] An

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[1] Along with its appeal of the local rate order, Falcon also filed an Emergency Petition for Stay of Enforcement on February 23, 1995. The County filed an opposition to the stay request on March 8, 1995. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] *See* Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*).

[8] At the time of Falcon's filing, an operator could adjust its full reduction rates for inflation, but not its provisional rates. Since that time, however, the Commission has ruled that an operator may also adjust its provisional rates for inflation. *See* Ninth Order on Reconsideration in MM Docket No. 92-266, FCC 95-43 (rel. Feb. 6, 1995).

[9] 47 C.F.R. § 76.922(d)(3)(iv).

[10] 47 C.F.R. § 76.922(d)(3)(iii).

operator may file a Form 1210 up to quarterly, but must file in the quarter following a decrease in costs due to channel deletions and within a year following a decrease in other costs.[11] An operator must file for a rate increase within a year of the cost increase in order to recover those costs in its rates.[12]

III. DISCUSSION

5. Prior to July 14, 1994, Falcon offered 15 channels on its basic tier for a monthly charge of $23.09. On that date, Falcon increased the total number of channels offered on its basic service tier to 19, and reduced its rate for the tier to $15.72, which Falcon claims complied with the Commission's revised rate regulations. On August 12, 1994, Falcon filed its Forms 1200, 1205 and 1215 with the County for review. The Form 1200 established a maximum permitted rate of $14.17 for the 15 basic service channels which Falcon offered on March 31, 1994, the date for which information is sought under Form 1200. Prior to a ruling on the rates justified by Falcon's Forms 1200, 1205, and 1215, on October 31, 1994, Falcon submitted a Form 1210, which reflected the channel additions Falcon made to the basic tier made on July 14, 1994 and which justified a rate increase to $15.69. The rate increase justified by the Form 1210 was due to the cost of providing the four additional channels, increases in external costs for existing channels, and an inflation adjustment. In its rate order, the County approved Falcon's Forms 1200, 1205, 1215, and 1210. However, the County found that the effective date of Falcon's Form 1210 rate increase was December 1, 1994, and ordered refunds for the period July 14, 1994 through November 30, 1994.

6. Falcon cites one of our public notices to support its contention that the rates it set on July 14, 1994, which were higher than those justified by its Form 1200 and which reflected the cost increases discussed above, were its "existing" rates under Section 76.933(a) of our rules,[13] and so prior approval was not required.[14] Falcon states that the reasonableness of its July 14, 1994 rates cannot be evaluated using Form 1200 alone, since that form is based on the rate structure in place on March 31, 1994, and its costs then were materially different from its costs on July 14, 1994. Thus, Falcon claims that the County was obligated to consider the Form 1210 it filed on October 31, 1994 in determining Falcon's maximum permitted rates as of July 14, 1994. Finally, Falcon contends that Commission rules only require an operator to receive prior approval before a rate increase,[15] and that on July 14, 1994, it decreased its rates from $23.09 to $15.72.

7. Under our rules, an operator must obtain prior approval for rate increases.[16] Falcon's argument, that its July 14, 1994 rates could be justified by combining data from its Form 1200 and Form 1210, is erroneous. Falcon's rates on July 14, 1994 were considerably higher than the $14.17 rate justified by its Form 1200. On October 31, 1994, Falcon submitted its Form 1210 and attempted to justify its "existing" rates with data from that submission. In effect, Falcon sought an increase from the rate justified by its Form 1200. However, such an increase requires prior approval or a failure by the local franchising authority to act.[17] Falcon cannot now bolster its July 14, 1994 rates with cost increases that occurred after March 31, 1994.[18] Falcon's reliance on the *Public Notice* issued on July 27, 1994 is not on point. That *Public Notice* refers only to Forms 1200, 1220 and 1225, which are the forms used to establish basic tier rates, as not requiring prior approval. Form 1210 is not included among them, because the other forms are the only forms by which an operator establishes its initial rates under the revised benchmark regulations. Form 1210 is used to reflect adjustments to those rates.

8. Moreover, even if the *Public Notice* provided that prior approval was not required for rate increases that occurred prior to May 15, 1994, Falcon has indicated no changes in costs or service to justify a rate increase prior to that time, or even in the second quarter of 1994. As we stated on the Form 1210, "The Form 1200 includes changes in external costs through March 31, 1994 (the first quarter of 1994) that may be included in your maximum permitted rates. You may begin using Form 1210 on July 1, 1994 to update your rates to reflect changes that occurred during the second quarter of 1994."[19] Falcon's channel additions did not occur until the third quarter of 1994. Under our rules, Falcon could not claim the inflation adjustment which it included in its Form 1210 until October 1, 1994.[20]

9. The fact that an operator availed itself of the optional deferral period, which permitted an operator to file its Forms 1200, 1205 and 1215 on July 14, 1994, does not have any impact on what constitutes an operator's "existing" rates. Indeed, the Commission established the deferral period because it recognized that operators might not be able to implement their revised rates by May 15, 1994, and so it wanted to give operators an opportunity to implement their rates under Forms 1200 and 1205 without accruing refund liability for the period from May 15, 1994 to July 14, 1994.[21] The purpose of the deferral period was not to permit operators to make last-minute adjustments to their

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[11] 47 C.F.R. §§ 76.922(d)(3)(i) & (ii). Inflation may only be recovered for the non-external portion of the operator's rates on an annual basis. 47 C.F.R. § 76.922(d)(2).

[12] 47 C.F.R. § 76.922(d)(3)(i).

[13] "After a cable operator has submitted for review its existing rates for the basic service tier and associated equipment costs, or a proposed increase in these rates (including increases in the baseline channel change that results from reductions in the number of channels in a tier), the existing rates will remain in effect or the proposed rates will become effective after 30 days from the date of submission; *provided, however,* that the franchising authority may toll this 30-day deadline for an additional time by issuing a brief written order as described in paragraph (b) within 30 days of the rate submission explaining that it needs additional time to review the rates." 47 C.F.R. § 76.933(a).

[14] *Public Notice*, Questions and Answers on Cable Television Rate Regulation at 3, Q & A No. 4 (July 27, 1994).

[15] 47 C.F.R. § 76.933(a).

[16] *Id.*

[17] *Id.*

[18] *Id.;* Instructions fo FCC Form 1210, Updating Maximum Permitted Rates for Regulated Cable Services at 2 (May 1994).

[19] Instructions for Form 1210, Updating Maximum Permitted Rates For Regulated Cable Services (May 1994) at 2.

[20] *Id.* at 14; 47 C.F.R. § 76.922(d)(2).

[21] *Second Reconsideration Order,* 9 FCC Rcd at 4183-84.

tier structure or rates.[22] The initial maximum permitted rates for operators that used the deferral period were the same as those who did not, because in both instances the rates are calculated based on rates, revenues, and costs in effect on March 31, 1994. In this case Falcon's initial maximum permitted rate for the basic service tier was $14.17. That rate was in effect until the County approved a rate increase in the subsequently filed Form 1210. Falcon did not file its Form 1210 until October 31, 1994. The County approved the increase in that filing, effective December 1, 1994. For the period July 14, 1994 through November 30, 1994, the difference between $15.72, the rate Falcon charged, and $14.17, Falcon's permitted rate, constitutes Falcon's refund liability. Because the County defined Falcon's refund liability in this manner in its rate order, we find its decision reasonable.

10 . Accordingly, IT IS ORDERED that Falcon Cable Systems Company's appeal of the local rate order of San Luis Obispo County, California, regarding its maximum permitted rates for its basic service tier for the period July 14, 1994 through November 30, 1994, is DENIED.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[22] *Id.* ("systems wishing to take advantage of this deferral of refund liability may not change any rate for regulated service or equipment, or restructure any regulated service or equipment offering . . . during the period that runs from the release date of this Order to July 14, 1994").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	CUID Nos. FL0202, Hialeah
	FL0427, Miami Springs
Dynamic Cablevision	FL0553, West Miami
of Florida, Inc.	FL0422, Sweetwater
	FL0429, Medley
Benchmark Filings	FL0675, Hialeah Gardens Cable
To Support	FL0428, Virginia Gardens
Programming	FL0416, Uninc. Dade County
Service Prices	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1995; Released: May 25, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Dynamic Cablevision of Florida, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. For each of the communities referenced in the caption, the first complete and timely complaint was served on Operator on September 17, 1993. The Commission received all of these complaints on September 28, 1993. In response to the complaints, Operator filed separate FCC Form 393s on November 16, 1993. Operator amended its justifications on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

5. Operator states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier and a CPS tier called Basic, Operator began offering ten channels on an individual, or a la carte, basis. These a la carte channels also could be purchased collectively as one six-channel package (Cable Plus) and one four-channel package (Expanded). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Operator in Hialeah, Florida.[12] In the LOI order, we found that the retiering constituted an evasion of rate regulation. We concluded that Operator's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, a reduction in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] Dynamic Cablevision of Florida, Hialeah, Florida, LOI-93-43, DA 94-1546 (Cab. Serv. Bur., released Dec. 22, 1994). In that case, Operator created two a la carte packages, one of which consisted of six channels that were previously offered as a separate CPS tier, and the other of which consisted of four channels that were removed from an 18-channel CPS tier.

them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms.

6. On January 23, 1995, Operator filed a Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of its a la carte packages. On March 9, 1995, Operator filed a motion for stay of the LOI decision and a motion requesting the Bureau to defer action on the complaints pending against its CPS rates in Florida until the Bureau rules on the Petition for Reconsideration. On March 29, 1995, the Bureau granted Operator's motion to stay the LOI decision.[13]

DISCUSSION

7. In its amended benchmark filing, Operator calculated a maximum permitted rate for the Basic CPS tier of $5.94 per month (plus franchise fee). Operator did not attempt to justify its monthly prices of $4.95 for the Cable Plus tier or $0.97 for the Expanded tier. Upon review, we have determined that Operator has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Operator did not count the ten channels in its Cable Plus and Expanded packages as rate-regulated channels or as satellite channels. In accordance with the finding in the Bureau's LOI order that these ten channels are rate-regulated channels, we increased the total number of rate-regulated channels from 40 to 50 and the total number of satellite channels from 19 to 29.

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

c. Operator's calculations for its cable services package as of September 30, 1992 (Form 393, Part II, Worksheet 2, Line 202) count 20 channels on the basic service tier, 19 channels on the Basic Plus CPS tier, and five channels on the Cable Plus CPS tier. However, according to the September 30, 1992 channel line-up presented in Operator's June 23, 1994 amendment, Operator offered 23 channels on the basic service tier, 16 channels on the Basic Plus CPS tier, and seven channels on the Cable Plus CPS tier. We therefore adjust Line 202 to reflect Operator's channel line-up card.

d. Because of these errors, we conclude that Operator has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[15] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of September 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rates, of 1.028.

8. These adjustments have the effect of decreasing the maximum permitted monthly price for the Basic CPS tier to $5.16 per month (plus franchise fee). Operator's actual monthly charge for the tier was $5.94 (plus franchise fee). Therefore, the actual charge for this tier was above the maximum permitted rate and was thus unreasonable.

9. The same adjustments result in a maximum permitted rate for the Cable Plus tier of $2.38 per month (plus franchise fee). Operator's actual monthly charge for the Cable Plus tier was $4.95 (plus franchise fee). Thus, the actual charge for this tier was above the maximum permitted rate and was thus unreasonable.

10. The same adjustments result in a maximum permitted rate for the Expanded tier of $1.59 per month (plus franchise fee). Operator's actual monthly charge for the Expanded tier was $0.97 (plus franchise fee). Thus, the actual charge for this tier was below the maximum permitted rate, and was thus reasonable.

11. Under the Commission's rules, Operator may be liable for refunds to compensate subscribers for the overcharges described above. However, since our resolution of the issues pending in Operator's Petition for Reconsideration of our LOI decision could require revisions to our analysis, we will stay the effective date of this Order in response to Operator's motion until we have issued our decision in that proceeding. Since interest charges on any

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[13] Dynamic Cablevision of Florida, Hialeah, Florida, LOI 93-43, DA 95-628 (Cab. Serv. Bur., released Mar. 29, 1995).

[14] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

required refunds will continue to accrue during the period of this stay, Operator's subscribers will not be adversely affected.

CONCLUSIONS

12. Upon review of the record herein, we conclude that, for the period from September 28, 1993 to May 14, 1994, Operator's showing supports maximum reasonable CPS tier prices of $5.16 per month (plus franchise fee) for the Basic CPS tier, $2.38 per month (plus franchise fee) for the Cable Plus tier, and $1.59 per month (plus franchise fee) for the Expanded tier.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

13. We further conclude that Operator must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Operator's prices for the Basic and Cable Plus CPS tiers during the earlier period were unreasonable. We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's rate justification for that period.

14. We further conclude that the effective date of this Order will be stayed until the Bureau releases a decision on Operator's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of Operator's a la carte packages in Hialeah, Florida.

15. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 17, 1993 complaints against the cable programming service prices charged by Operator in the areas referenced in the caption ARE GRANTED TO THE EXTENT INDICATED HEREIN.

16. IT IS FURTHER ORDERED that the benchmark filings submitted by Operator with respect to the areas referenced in the caption for the period of September 28, 1993 to May 14, 1994, justify maximum prices of $5.16 per month (plus franchise fee) for the Basic CPS tier, $2.38 per month (plus franchise fee) for the Cable Plus tier, and $1.59 per month (plus franchise fee) for the Expanded tier.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers for the period from September 28, 1993[17] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $5.16 per month (plus franchise fee) for the Basic CPS tier and $2.38 per month (plus franchise fee) for the Cable Plus tier, and was thus unreasonable, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED that Operator shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

19. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Operator shall, within 30 days of the effective date of this Order, revise its Form 1200 filings for the period beginning May 15, 1994, to include the Cable Plus and Expanded packages as cable programming service tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices determined in this Order (plus franchise fee).

20. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after submission of the revised Form 1200 filings required above, CPS tier prices for the areas referenced in the caption that reflect the reductions in the CPS rates determined in this Order.

21. IT IS FURTHER ORDERED that Operator's motion to defer action on the complaints against its cable programming service prices is resolved as indicated herein.

22. IT IS FURTHER ORDERED that the effective date of this Order will be stayed until the Commission releases a decision on Operator's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of its a la carte packages in Hialeah, Florida.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[16] These findings are based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint -is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The GTE Telephone Operating Companies	Transmittal Nos. 962, 968
Tariff F.C.C. No. 1	
GTE System Telephone Companies	Transmittal Nos. 145, 149
Tariff F.C.C. No. 1	

ORDER

Adopted: May 24, 1995; Released: May 24, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. On May 8, 1995, GTE Telephone Operating Companies (GTOC) and GTE System Telephone Companies (GSTC) filed Transmittal Nos. 962 and 145. In these transmittals, GTOC and GSTC (collectively GTE) seek to increase the rates for a number of their services. On May 15, 1995, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate and AT&T Corp. (AT&T) filed a petition to reject or, in the alternative, suspend and investigate, Transmittal Nos. 962 and 145. GTE Service Corporation (GTE), on behalf of GTOC and GSTC, its affiliates, filed a reply on May 18, 1995.

2. In Transmittal No. 962, GTOC proposes to increase rates, in certain jurisdictions, for local switching, information surcharge, 800 data base query and several of the switched transport rate elements, such as residual interconnection charge, tandem switching and direct trunk transport. GTOC also proposes rate changes for certain special access rate elements, carrier common line and directory assistance. In Transmittal No. 145, GSTC proposes to change the terminating rate for carrier common line rate in Texas.

3. In their petitions, MCI and AT&T contend that GTE is seeking rate increases to offset rate decreases recently ordered by the Commission in the Local Exchange Carrier (LEC) Price Cap Performance Review proceeding.[1] According to the petitioners, the Commission ordered a one-time reduction in LEC price cap indexes (PCIs) to correct the effects of its previous underestimation of LEC productivity and GTE's proposed rate increases are fundamentally inconsistent with that directive.[2] MCI and AT&T maintain that, while the rates do not have to be lowered until August 1, 1995, the required revisions in the treatment of exogenous costs attributable to Other Post-Retirement Benefits (OPEBs) nonetheless became effective on May 19, 1995, and thus GTE no longer has the pricing flexibility based on such exogenous costs to make these rate increases.[3] AT&T also argues that GTE is stopped from using the delayed filing period for the 1995 annual access filings to collect increased rates.[4]

4. In its reply, GTE asserts that the *LEC Price Cap Performance Review Order* does not preclude LECs from implementing interim rate increases prior to the 1995 annual filings and that while the LECs were ordered to file reductions to adjust for past productivity factors, this order takes effect on a prospective basis to be implemented in the 1995 annual filing. Accordingly, GTE maintains that nothing in the Order or the Commission's Rules prohibits GTE from filing within-band adjustments up to the time the annual filing takes effect, which is August 1, 1995.[5] GTE maintains that its current and proposed rates are well within its current PCIs and that the proposed increases account for only 18 percent of available below-cap dollars.[6] Finally, GTE argues that pricing flexibility attributable to OPEBs accounts for only .6 percent of its proposed increases and that it should not be estopped from these interim rate increases because these increases are for a limited number of tariff areas and for a relatively short period of time.[7]

5. On May 18, 1995, MCI filed a letter stating that while GTE now seeks rate increases of $74 million, GTE had previously requested that the Commission allow it to substantially reduce the same rates that it now wants to increase because "'it faces significant competition in the major metropolitan areas of Tampa, Los Angeles, Dallas and Seattle.'"[8] MCI does not allege in this letter that the rates proposed in Transmittal Nos. 962 and 145 are above any relevant PCI or service band index (SBI) limits.

6. On May 22, 1995, GTE was granted special permission to amend these transmittals to remove any reference to the use of pricing flexibility available under their current PCI levels that results from the exogenous cost treatment of accounting changes ordered by the Financial Accounting Standards Board for other post-retirement benefits.[9] These benefits are generally health and other insurance benefits payable to retirees. GTE filed these amendments on May 22, 1995, as GTOC Transmittal No. 968 and GSTC Transmittal No. 149.

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[1] Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, released Apr. 7, 1995 (*LEC Price Cap Performance Review Order*).
[2] MCI Petition at 3, citing *LEC Price Cap Performance Review Order* at para. 254; AT&T Petition at 4-5.
[3] MCI Petition at 4-8; AT&T Petition at 5-6.
[4] *Id.* at 4.
[5] GTE Reply at 2-3.
[6] *Id.* at 3.
[7] *Id.* at 4-6.
[8] Letter of Don Sussman, MCI, to Secretary, Federal Communications Commission (filed May 18, 1995), quoting In the Matter of GTE Telephone Operating Cos., Investigation of Below-Band Transport Rates, CC Docket No. 92-141, 10 FCC Rcd 1573, 1573 (1994).
[9] Special Permission Nos. 95-603 and 95-604, granted by the Chief, Tariff Division, May 22, 1995.

7. We have reviewed the tariffs filed by GTE, as revised, and all the associated pleadings. We conclude that no compelling argument has been presented that the tariffs are patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

8. ACCORDINGLY, IT IS ORDERED that the petition to suspend and investigate GTE Telephone Operating Companies Transmittal No. 962 and GTE System Telephone Companies Transmittal No. 145 filed by MCI Telecommunications Corporation and the petition to reject, or in the alternative, to suspend and investigate GTE Telephone Operating Companies Transmittal No. 962 and GTE System Telephone Companies Transmittal No. 145 filed by AT&T Corp., ARE DENIED.

9. IT IS FURTHER ORDERED that GTE may file tariff revisions, to become effective on same day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Section 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. GTE should cite the "DA" number of this Order as its authority for making the short notice tariff filing.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-97

In the Matter of

US West Communications, Inc. Revisions to Tariff F.C.C. No. 5 — Transmittal No. 614

ORDER

Adopted: May 25, 1995; Released: May 25, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 11, 1995, US West Communications, Inc. (US West) filed Transmittal No. 614 to revise its Tariff F.C.C. No. 5. Transmittal No. 614, which is scheduled to become effective on May 26, 1995, provides that interconnector-designated equipment for virtual collocation service shall be purchased by the interconnector and leased to US West at no cost. Transmittal No. 614 also provides that US West will return the interconnector-designated equipment to the interconnector upon termination of virtual collocation service. Additionally, Transmittal No. 614 proposes new rate elements for the equipment bay, power, installation labor charges, and planning and engineering for installation and removal of interconnector-designated equipment. The Association for Local Telecommunications Services (ALTS), MFS Communications Company, Inc. (MFS) and Electric Lightwave, Inc. (ELI) filed petitions to reject, or suspend and investigate, the US West transmittal on April 26, 1995. US West filed a reply to the petitions on May 3, 1995.

2. MFS and ELI argue that the overhead loading factor of 1.30 proposed by US West is excessive and that it should not exceed 1.20.[1] MFS and ALTS contend that US West's proposal to waive liability for damage to the interconnector-designated equipment, unless the damage is due to the gross negligence or wilful misconduct of US West employees, is unreasonable.[2] Additionally, ALTS argues that US West should be required to store a reasonable quantity of spare parts.[3] MFS further contends that the provisions regarding the disposal of interconnector-designated equipment are unreasonable.[4]

3. In its reply, US West argues that the tariff provisions regarding the disposal of equipment and the waiver of liability are reasonable and not unlawful.[5] US West contends that the interconnectors should be responsible for the storage of spare parts.[6] With respect to the overhead loading factor, US West claims that 1.30 is an appropriate overhead loading factor, and is not unlawful.[7]

4. The transmittal filed by US West raises the same issues as the permanent virtual collocation tariffs that were suspended for one day and made subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*.[8] Therefore, the above-captioned transmittal is suspended for one day, until May 27, 1995, and will be subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*. This transmittal will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

5. IT IS ORDERED that the petitions to reject in part or suspend and investigate in part US West Communications, Inc. Tariff F.C.C. No. 5, Transmittal No. 614, filed by The Association for Local Telecommunications Services, MFS Communications Company, Inc. and Electric Lightwave, Inc. ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

6. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to US West Communications, Inc. Tariff F.C.C. No. 5, Transmittal No. 614, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

7. IT IS FURTHER ORDERED that US West Communications, Inc. SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

8. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. US West Communications, Inc. should cite the "DA" number of the instant Order as the authority for this filing.

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[1] MFS Petition at 5-6; ELI Petition at 2-4.
[2] MFS Petition at 6-7; ALTS Petition at 2.
[3] ALTS Petition at 3.
[4] MFS Petition at 7.
[5] US West Reply at 7-10.
[6] *Id.* at 10-11.
[7] *Id.* at 11-13.
[8] Ameritech Operating Companies *et. al.*, CC Docket No. 94-97, Order, 10 FCC Rcd 1960 (1994) (*Virtual Collocation Tariff Suspension Order*). The *Virtual Collocation Tariff Suspension Order* suspended for one day and initiated an investigation of the permanent virtual collocation tariffs filed on September 1, 1994 by the Tier 1 local exchange carriers subject to expanded interconnection requirements. In the *Phase I Designation Order*, the Common Carrier Bureau designated issues for investigation regarding the overhead loadings in the LECs' interim and permanent virtual collocation tariffs. The Bureau stated that it would designate additional issues regarding rate levels, rate structures, and terms and conditions of service in the second phase of its investigation. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Order Designating Issues for Investigation, DA 95-374 (released Feb. 28, 1995) (*Phase I Designation Order*). In an Order released on May 11, 1995, the Commission concluded the first phase of its investigation by prescribing the maximum permissible overhead loading levels for most LECs' virtual collocation rates. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Report and Order, FCC 95-200 (released May 11, 1995).

9. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), US West Communications, Inc. shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Monterey Peninsula TV Cable — CUID No. CA0036 (Pacific Grove)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 2, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was served on Operator on October 28, 1993 and was received by the Commission on October 15, 1993. On November 15, 1993, Operator filed a motion to dismiss the complaint. In its motion, Operator requests that the Commission dismiss the complaint for a number of reasons. First, Operator asserts that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed because he listed in his complaint channels that were sold on the basic service tier as well as channels that were offered on the CPS tier. In addition, Operator urges the Commission to find the complaint deficient on the ground that the complainant incorrectly answered question number 8. Operator argues that the challenged rate as listed by the complainant includes basic rates and therefore does not indicate what rate the complainant finds unreasonable. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he believed that rate was unreasonable.[11] We therefore find the complaint valid and deny Operator's motion to dismiss.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[12] Operator subsequently filed a motion to dismiss on November 22, 1993 in response to a complaint that was sent to Operator on October 25, 1993. However, our records show that this October 25, 1993 complaint was not processed by the Commission due to filing deficiencies by the complainant. Since the complaint was returned to the complainant as invalid, it is unnecessary to rule on this motion.

5. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[13]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[13] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Service Electric Cable TV, Inc., PA 87-0013
Mansfield Video, and,
Communicable, Inc.,
Complainants,

v.

Commonwealth Telephone Company
Respondent

ORDER

Adopted: August 23, 1995 **Released: August 29, 1995**

By the Chief, Accounting and Audits Division:

1. On August 21, 1995, Service Electric Cable TV, Inc., Mansfield Video, and Communicable, Inc. (collectively, Complainants) requested that their pole attachment complaint against Commonwealth Telephone Company, filed August 10, 1987, and amended on April 15, 1988, be dismissed. The Complainants state that they have reached a settlement of their dispute.

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that the subject complaint IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 95-139

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Fayetteville, North
Carolina, in the Raleigh-Durham-
Goldsboro Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1995; Released: August 29, 1995

Comment Date: October 20, 1995
Reply Comment Date: November 6, 1995

By the Deputy Chief, Cable Services Bureau:

1. Before the Commission is a joint petition for rule making filed by Capital Cities/ABC, Inc., licensee of television station WTVD(TV), channel 11, Durham, North Carolina; Capitol Broadcasting Company, Inc., licensee of television station WRAL(TV), channel 5, Raleigh, North Carolina; Delta Broadcasting, Inc., licensee of television station WKFT(TV), channel 40, Fayetteville, North Carolina; FSF TV, Inc., licensee of television station WRDC(TV), channel 28, Durham, North Carolina; and Paramount Stations Group of Raleigh Durham Inc., licensee of television station WLFL(TV), channel 22, Raleigh, North Carolina (collectively "Petitioners"), to amend Section 76.51 of the Commission's Rules[1] to add Fayetteville, North Carolina as a designated community in the "Raleigh-Durham" North Carolina television market.[2] Subsequent to the filing of this petition, the market list was amended to include Goldsboro as a designated community in the market.[3] Accordingly, this request will be treated as requesting the addition of Fayetteville to the Raleigh-Durham-Goldsboro market.

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators.[4] Certain cable television syndicated exclusivity and network nonduplication rights are also determined by the presence of broadcast station communities of license on this list.[5] Some markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.[6] Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.[7]

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of aparticularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[8]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[9] which added Section 614 to the Communications Act of 1934,[10] requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. The Commission has stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.[11]

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[1] 47 C.F.R. §76.51.

[2] *See Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[3] *Report and Order* in Docket 93-212, 9 FCC Rcd. 4387 (1994).

[4] *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). With passage of the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994) local signal copyright liability is now accorded stations throughout their mandatory cable carriage area, that is, throughout the "area of dominant influence" or ADI of the market to which the station is assigned. Although this generally reduces the importance of the Section 76.51 market list as a determinator of copyright liability, there remain situations where the list determines liability, i.e., where the 35-mile zones associated with the Section 76.51 list extent outside of the ADI of the market.

[5] *See* 47 C.F.R. Part 76, Subpart F.

[6] *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974).

[7] *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

[8] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[9] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[10] 47 U.S.C. §614.

[11] [R]equests for specific hyphenated market changes that ap-

THE PETITION

5. According to the petitioners, Fayetteville is located approximately 59 miles southwest of Raleigh and 72 miles south of Durham. Cumberland County in which Fayetteville is located is now the second largest county in the Raleigh-Durham television market and contains 12 percent of the market's television households. Fayetteville is said to be located within and is a "core" city -- economically, socially and culturally -- within the Raleigh-Durham ADI. It attaches a map, prepared by the North Carolina Department of Transportation, which depicts the geographical proximity of the three cities. Of the five petitioning stations, WRAL (CBS) and WLFL (Fox) are licensed to Raleigh, WTVD (ABC) and WRDC (NBC) are licensed to Durham, and WKFT (Ind.) is licensed to Fayetteville. These five stations compete head-to-head throughout the market for programming, viewers and advertising revenues. Newspapers in Raleigh and Durham, it is said, recognize WKFT, Fayetteville, in the television listings for the Raleigh-Durham area, and newspapers in Fayetteville include the Raleigh-Durham television stations in their television listings.

6. Petitioners further state that, although WKFT(TV) is unavoidably competitive with the other market-area stations, it is disadvantaged in this competition by having to compete with other stations in the market without comparable cable television carriage rights. Although it is entitled to carriage on area cable systems by virtue of its inclusion in the Raleigh-Durham ADI,[12] because Fayetteville is not a designated community in the Section 76.51 market listings, it is considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.[13] As a result, petitioners state, they face additional copyright fees attendant to carriage as a "distant signals." The principal benefit of the requested change, however, is said to be parity among market stations under Section 73.658(m) of the Commission's rules (territorial exclusivity rules).

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television station licensed to Raleigh, Durham, Goldsboro and Fayetteville, do compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market. Accordingly, comment is requested on the proposed addition of Fayetteville to the Raleigh-Durham-Goldsboro television market. Comment is sought in particular on what consequences, if any, result to the proposal from the addition of Goldsboro to the market (see paragraph 1 above) and from changes in copyright law attendant to passage of the Satellite Home Viewer Act of 1994 (see note 4 above).

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before October 20, 1995, and reply comments on or before November 6, 1995. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall "send a copy of this *Notice of Proposed Rule Making,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

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pear worthy of consideration will be routinely docketed and issued as "rulemaking proposals." *See Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.50 (1993).

[12] *See* Section 76.56(b) of the Commission's Rules.

[13] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Fayetteville as a designated community in this market list generally results in WKFT(TV)'s classification as a "distant signal" for market-area cable systems more than 35 miles from Raleigh, Durham, and Goldsboro and outside of the Raleigh-Durham ADI. By amending Section 76.51 of the Rules to include the community of Fayetteville in the market as proposed, cable systems will be able to carry the signals of stations from Raleigh, Durham, Goldsboro, and Fayetteville on an equal basis in terms of copyright liability.

Additional Information

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules. For additional information on this proceeding, contact William H. Johnson (202) 416-0800.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 29, 1995

ALLTEL TELEPHONE SYSTEMS FILES REVISED INITIAL COST ALLOCATION MANUAL

PUBLIC COMMENTS INVITED

On August 16, 1995, Alltel Telephone Systems (ALLTEL) filed a revised, initial cost allocation manual (CAM) for the separation of regulated and nonregulated costs on behalf of Alltel Georgia Communications Corporation, ALLTEL Pennsylvania, Inc., and The Western Reserve Telephone Company. This CAM was filed pursuant to Section 64.903 of the Commission's Rules. Parties may file comments on ALLTEL's CAM no later than **September 8, 1995.** Replies should be filed by **September 18, 1995.** Comments should reference file number 94-147. A copy of each pleading should be sent to Kenneth M. Ackerman, FCC, Common Carrier Bureau, 2000 L St., N.W. Room 812, Washington, D.C. 20554. A copy should also be sent to the International Transcription Service (ITS), 2100 M St., N.W. Suite 140, Washington, D.C. 20037, (202)587-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Tom Petras at (202)418-0809.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 29, 1995

AMERITECH FILES REVISIONS TO ITS COST ALLOCATION MANUAL ASSOCIATED WITH THE MARKET TRIAL OF PAYPHONE MESSAGE DELIVERY SERVICE

PUBLIC COMMENT INVITED

On July 17, 1995 with a subsequent revision on July 26, 1995, the Ameritech Operating Companies -- Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. -- (Ameritech) filed revisions to its Cost Allocation Manual (CAM) to reflect the market trial of its Payphone Message Delivery Service (PMDS). PMDS, which is a nonregulated activity, provides customers a means of recording a message via a pay telephone and having delivery attempts made to a called party when a busy or no answer condition exists.

Parties may file comments on Ameritech's proposed change to its CAM on PMDS by **September 19, 1995.** Replies should be filed by **September 29, 1995.** Comments and replies should reference AAD 95-125. A copy of each pleading should be sent to Ed Dashkin, FCC Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Ed Dashkin at (202) 418-0806.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-180

In the Matter of

Amendment of Section 73.202(b),	RM-7698
Table of Allotments,	RM-7818
FM Broadcast Stations.	RM-7819
(Seabrook, Huntsville, Bryan, Victoria, Kenedy, and George West, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1995; Released: August 29, 1995

By the Commission:

1. The Commission has before it the Application for Review filed by Helen Maryse Casey ("Casey") directed to the *Report and Order* in this proceeding, 7 FCC Rcd 5613 (1992).[1] KRTS, Inc. ("KRTS") filed an "Opposition to Application for Review, Petition for Leave to File Supplement and Supplement, and Second Petition for Leave to File Supplement and Supplement." Casey filed a Reply to that Opposition. For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. At the request of KRTS, Inc., licensee of Station KRTS, Channel 221C2, Seabrook, Texas, the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 3665 (1991), proposed the substitution of Channel 221C1 for Channel 221C2 at Seabrook, and modification of the Station KRTS license to specify operation on Channel 221C1. In response to the *Notice*, Casey, permittee of Station KCEY, Channel 259A, Huntsville, Texas, filed a counterproposal proposing the substitution of Channel 258C2 for Channel 259A at Huntsville, and modification of her construction permit to specify operation on Channel 258C2. To accommodate this counterproposal, Casey also proposed the substitution of Channel 221A for Channel 258A at Bryan, Texas, and modification of the construction permit for Station KBMA, Channel 258A, Bryan, to specify operation on Channel 221A. This Channel 221A substitution at Bryan conflicted with the proposed Channel 221C1 upgrade at Seabrook. Thereafter, we issued an *Order to Show Cause*, 7 FCC Rcd 2109 (1992), directed to Mexican-American Communications, permittee of Station KBMA, to show cause why its construction permit should not be modified to specify operation on Channel 221A.

3. The *Report and Order* in this proceeding granted the proposed Channel 221C1 substitution at Seabrook and upgraded the Station KRTS license to specify operation on Channel 221C1. In doing so, it denied the conflicting Casey proposal for a Channel 258C2 upgrade at Huntsville and accommodating Channel 221A substitution at Bryan. That action was premised on our FM allotment priorities set forth in *Revision of FM Policies and Procedures ("FM Priorities")*, 90 FCC 2d 88 (1982), which are as follows:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)][2]

Based on its own engineering analysis, the staff determined that Casey's proposed upgrade at Huntsville would provide additional service to 112,356 persons in an area of 5,754 square kilometers. Within this gain area and population, the staff also determined that the Huntsville upgrade would provide a second full-time aural service to 455 persons in an area of 61.2 square kilometers.[3] In contrast, the proposed upgrade at Seabrook would result in additional service to 256,984 persons in an area of 3,780 square kilometers. In the *Report and Order*, the staff determined that the population difference was decisional under Priority 4. In granting the proposed upgrade at Seabrook, the staff determined that the second full-time aural service to 455 persons in an area of 61.2 square kilometers was *de minimis* in view of the fact that the proposed Seabrook upgrade would provide additional service to more that twice as many persons as the total service gain of the Huntsville proposal.

4. In support of her Application for Review, Casey argues that a provision for a second aural service to 455 persons is not *de minimis* and should have been dispositive

[1] Public notice was given on November 11, 1992 (Report No. 1915). In regard to her Application for Review in this proceeding, Casey has also filed a "Petition for Leave to File Supplement and Supplement," and a "Second Petition for Leave to File Supplement and Supplement." KRTS filed a "Motion to Strike Application for Review, Petition for Leave to File Supplement and Supplement, and Second Petition for Leave to File Supplement and Supplement." Casey filed an Opposition to Motion to Strike and KRTS filed a Reply to that Opposition. Thereafter, Casey filed an Erratum to Reply to Opposition and KRTS filed a "Motion to Strike Reply and Erratum to Reply to Opposition to Application for Review, Petition for Leave to File Supplement and Supplement, and Second Petition for Leave to File Supplement and Supplement."

[2] In *FM Priorities*, we specifically stated that these Priorities are intended to meet our obligation under Section 307(b) of the Communications Act of 1934, as amended, to provide "a fair, efficient, and equitable distribution of radio service."

[3] The *Report and Order* specifically stated that "... our engineering analysis indicates that the area which would receive a second full-time, and a first nighttime aural service is 61.2 square kilometers with a population of about 455 persons." 7 FCC Rcd at 5615, para.8. The reference to a first nighttime service in the area was incorrect. Rather, the Casey proposal would provide a second full-time reception to approximately 455 persons in the above-referenced area.

under Priority 2 of *FM Priorities, supra*.[4] Second, Casey argues that the staff did not take into consideration the fact that her proposed Huntsville upgrade would have provided a third aural service to 18,629 persons in an area of 937 square kilometers, a fourth aural service to 11,307 persons in an area of 1,707 square kilometers, and a fifth aural service 8,243 persons in an area of 882 square kilometers. In this regard, Casey notes that the entire proposed Seabrook gain area receives at least 15 aural services. Third, Casey argues that the staff determination, based on "raw population" data of the respective proposed gain areas, should have taken into consideration her larger proposed service area, and the fact that between 1980 and 1990, this area had experienced a higher population growth rate. Finally, Casey states her intention to supplement her engineering statement pursuant to *Greenup, Kentucky and Athens, Ohio ("Greenup")*, 4 FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991), *appeal dismissed sub nom., WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (September 26, 1991), in which population totals may be discounted in proportion to the number of services available within the proposed service areas.[5]

5. Thereafter, on October 26, 1992, Casey filed a "Petition for Leave to File Supplement and Supplement." In that Supplement, Casey includes an engineering exhibit indicating that there would be a minimum of one and a maximum of 24 full-time aural services within her proposed gain area, and a minimum of 15 and a maximum of 33 full-time aural services within the Seabrook gain area. In addition, Casey refers to the "time consuming" *Greenup* process of identifying and evaluating service areas within the respective gain areas in order to determine a composite service value index for each gain area. On October 30, 1992, Casey filed a "Second Petition for Leave to File Supplement and Supplement" which includes an engineering exhibit setting forth a *Greenup* showing indicating that the raw population advantage for the Seabrook proposal is "substantially reduced" pursuant to the *Greenup* study. Specifically, the composite service index for the Station KRTS upgrade at Seabrook is 17,562, and the index for Casey's Station KCEY upgrade at Huntsville is 16,227. According to Casey, this 8.2% difference in favor of the Seabrook upgrade is offset by the greater population growth within the proposed Huntsville service area and the provision for a second aural service under Priority 2.

DISCUSSION

6. After careful consideration of this matter, we deny the Application for Review. This action is based upon the population differences in the respective upgrade gain areas and the fact that a second aural service to 455 persons is *de minimis*[6] when considered in conjunction with the fact that the Seabrook upgrade will provide service to over 144,000 more persons than the competing Huntsville upgrade.[7] In doing so, we agree with the staff calculations with respect to the population within the Seabrook gain area (256,984 persons) and the population within the Huntsville gain area (112,356 persons), and the fact that the Huntsville upgrade would provide a second aural service to 455 persons.

7. Casey disputes the staff population calculations in this proceeding. Originally, KRTS estimated that its proposed upgrade at Seabrook would have provided additional service to 448,412 persons within its gain area, and Casey estimated that the service gain for her Huntsville upgrade would be 196,735 persons and a second aural service to 1,823 persons. In her Application for Review, Casey states that the staff "provided no explanation" for its own engineering calculations reducing these totals. We believe that our calculations are accurate. The population totals were calculated on the basis of the population within the 1 mv/m contour assuming maximum facilities. We then totaled the population of each county within the 1 mv/m contour. With respect to counties partially within the 1 mv/m contour, we included the population of urbanized areas within this contour and then prorated the remaining population of the county on the basis of the percentage of area within the 1 mv/m contour. In determining the population that would receive a second aural service, we superimposed upon the gain area, the 1 mv/m contours of all commercial FM stations, except Class C stations, assuming maximum facilities. In regard to Class C stations and noncommercial FM stations, we based the 1 mv/m contour upon actual facilities. With respect to AM stations, we superimposed both the daytime and nighttime 2 mv/m contours upon the gain areas. The population of the area receiving only one aural service was then calculated in the same manner we calculated the population within the gain area. We continue to believe that our calculations pursuant to this procedure were accurate and provide a reliable basis to compare the competing Huntsville and Seabrook upgrades.

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[4] Originally, Casey contended that her upgrade at Huntsville would provide a second aural service to 1,823 persons in an area of 245 square kilometers. In her Application for Review, Casey revises this estimate downward to 778 persons in an area of 120 square kilometers. Thereafter, in her Second Supplement, Casey further reduces this estimate to 528 persons in an area of 77 square kilometers.

[5] In *Greenup*, we permitted a rule making proponent to make an engineering showing that discounts the raw population totals in proportion to the number of services available in the proposed service areas. Specifically, for each upgrade, a proponent must first isolate regions within each county division of a proposed gain area according to the number of services received within this region or "pocket." Then, the proponent calculates the number of persons within each pocket. Third, the population within a pocket is divided by the number of services received in order to obtain a service value "index." The proponent then adds the service value indices within each county. Finally, the indices for all the counties within a gain area are totaled to arrive at a composite service value index. As a result of this calculation, the proposal with the highest index would be preferred under Priority 4.

[6] In June of 1995, KRTS, Inc. filed a "Motion for Leave to File Supplement and Supplement to Opposition to Application for Review" suggesting that a recent staff action in *Huntsville and Willis, Texas*, 10 FCC Rcd 3329 (1995) has reduced the gray area population in this case from 455 to 9 persons. Given our determination here that the provision of a second aural reception service to 61.2 square kilometers with a population of 455 persons is *de minimis*, we need not consider this pleading.

[7] There is no basis in this case to consider the Huntsville area's growth rate in order to speculate that the Huntsville gain area may, at some future date, have a comparable population to the Seabrook gain area.

8. In resolving this matter under Priority 4, it is necessary to review the staff decision that a second aural service to 455 persons is *de minimis* and therefore not entitled to a preference under Priority 2. It is also necessary for us to discuss the basis for this conclusion. First of all, whether an additional service gain to a particular number of persons is *de minimis* directly relates to the total number of persons that would be affected by an allotment proceeding. Furthermore, the issue of whether a particular population gain is *de minimis* pertains to all four Priorities in *FM Priorities*. We will not give a decisional preference or apply any of these Priorities in a manner that would lead to an anomalous result or otherwise circumvent the public interest. Before and after *FM Priorities*, we have consistently declined to apply our priorities in ways that would produce anomalous results. For example, in *Anamosa and Iowa City, Iowa*, 46 FCC 2d 520 (1974), we stated that such an anomalous result would have occur red had we awarded an automatic preference as a first local service to a community of 100 persons over a second channel to a community of 1,000,000 which also provides a second aural service to 4,000,000 persons.[8] *See also New South Broadcasting v. FCC*, 879 F.2d 867 (D.C. Cir. 1989).

9. Consistent with this policy, in *Live Oak and St. Augustine, Florida*, 4 FCC Rcd 758 (1989), the staff granted an upgrade for Station WUVU in St. Augustine over a competing upgrade for Station WQHL in Live Oak because of the population differential in the respective gain areas of 588,515 versus 653 persons. The fact that the Live Oak upgrade would have provided a first aural service to 60 persons was deemed to have been *de minimis* in light of the disparity in the population gains. Similarly, in both comparative application and FM allotment proceedings, we have not automatically given a decisional preference to a first local service, which upon a strict reading of the Priorities, would prevail under Priority 3. For instance, in *North Charleston, Eastover and Elloree, South Carolina*, 51 RR2d 25 (1982), the staff allotted a second FM channel to North Charleston over competing proposals to allot the FM channel to either Eastover or Elloree as a first local service. In that action, the staff noted that the respective populations of Eastover and Elloree are slightly less than 1,000 while the population of North Charleston was in excess of 70,000. *See also Santee Cooper Broadcasting Co.*, 57 RR2d 662 (Rev. Bd. 1984) (no dispositive first local service credit to a community of 541 persons); *Ruarch Associates*, 99 FCC 2d 338 (Rev. Bd. 1984), *aff'd*, 101 FCC 2d 1358 (1985)(no dispositive first local service credit to a community of 752 persons); *New South Broadcasting v. FCC, supra*.[9] Inasmuch as *FM Priorities* gave co-equal weight to second aural service (Priority 2) and first local service (Priority 3), prior determinations not to give an automatic decisional preference to small communities under 1,000 as a first local service are relevant with respect to determinations regarding a second aural service. A finding that a second aural service to 455 persons is *de minimis* is consistent with instances where we declined to afford a first local service preference to a community under 1,000. In those situations, as well as the present situation, we believe that comparing competing proposals on the basis of all public interest factors under Priority 4 is both consistent with the public interest and Section 307(b) of the Act.

10. The argument advanced by Casey that her Huntsville upgrade would provide a third aural service to 18,629 persons, a fourth aural service to 11,307 persons, and a fifth aural service to 8,243 persons does not warrant reversing the staff decision. The *Report and Order* determined that the provision for third, fourth and fifth aural services did not override the overall population differential of 144,628 persons. We are aware of the public interest benefits of third, fourth and fifth aural services, and the need to provide service to areas that are relatively underserved. In order to take such factors into consideration, we adopted *Greenup* which allowed Casey to make a showing, as discussed earlier in footnote 5 *infra*, that would discount the raw population advantage. We emphasize that in the absence of such a showing, we will continue to first consider the raw population differential. *See* 6 FCC Rcd at 1495, para. 15. Our action in *Greenup* was released March 11, 1991.

11. The *Notice of Proposed Rule Making* in this proceeding, released June 26, 1991, set forth a comment date of August 19, 1991, and a reply comment date of September 3, 1991. Casey had 54 days to submit a timely *Greenup* showing in response to the *Notice* and has offered no explanation why she did not do so. We will not consider the *Greenup* showing.[10] The fact that the engineering study necessary to assemble such an exhibit may be "time consuming" does not justify first setting it forth in an Application for Review and Supplement filed more than one year after the comment date. Moreover, Section 1.115(c) of our Rules limits favorable action on Casey's Application for Review on the basis of this *Greenup* exhibit because the staff was not afforded an opportunity to consider this argument.[11] In this instance, waiver of Section 1.115(c) of the Rules would not be appropriate because of prejudice to the other party in this proceeding and the fact consideration of the *Greenup* exhibit would not affect the outcome.

ALTERNATE SITE

12. In her comments and reply comments, Casey contended that both her proposed upgrade at Huntsville and the proposed upgrade at Seabrook could be accommodated by an alternate reference site for the Seabrook upgrade. The *Report and Order* rejected the alternate site proposal for the Seabrook upgrade. In doing so, the staff noted that an upgrade to a Class C1 facility at the site set forth by Casey would actually serve fewer persons than the existing Station KRTS Class C2 facility at Seabrook. In her Applica-

[8] To avoid such results, we gave co-equal weight to Priorities 2 and 3.

[9] In *New South Broadcasting v. FCC*, the Court affirmed a Commission decision not to award an AM applicant a preference as a first local service to a community of under 3,000 persons.

[10] In view of the fact that we will not be considering the *Greenup* exhibit submitted as a Supplement to the Application for Review, it will not be necessary to consider the KRTS Motion to Strike directed to the Supplements.

[11] We again emphasize that if a party wishes to have raw population figures discounted to take into consideration existing services, it must file a timely *Greenup* exhibit. Even if we were to consider the *Greenup* exhibit in this instance, we note that according to this exhibit, the Seabrook proposal would again prevail with a composite service index of 17,562 compared to the Huntsville composite service index of 16,227.

tion for Review, Casey argues that the staff did not consider this proposal which would have removed the mutual exclusivity. In this connection, Casey also states that the staff did not give appropriate weight to her suggestion that a Seabrook upgrade could be implemented at a short-spaced site with a directional antenna which would eliminate any service loss.

13. There was no justification to consider the alternate site suggested by Casey.[12] First of all, we agree with the staff analysis that the alternate site suggested by Casey for a Class C1 allotment would have served fewer persons than the existing Station KRTS Class C2 facility. In addition to the fact that KRTS stated an unwillingness to upgrade at such a site, we see no public interest in the alternate site proposal. This proposal withdraws service from over 100,000 persons and eliminates the possibility, as set forth in the KRTS counterproposal, of providing additional service to 256,984 persons. Our conclusion is not negated by the Casey suggestion that KRTS could actually implement such an upgrade at a short-spaced site using a directional antenna in accordance with Section 73.215 of our Rules.[13] According to Casey, this would obviate a loss of service. Casey has not identified this site or demonstrated that such a proposal would comply with Section 73.215 of the Rules. In any event, we see no public interest benefit in having KRTS use a directional antenna in order to avoid a reduction in the number of persons within its service area, and denying the Station KRTS upgrade, as proposed by KRTS, which will provide additional service to a substantial number of persons.

RELATED MATTERS

14. In response to the *Notice*, we received two other counterproposals. Calvert Broadcasting Company ("Calvert Broadcasting") filed a counterproposal proposing the allotment of Channel 253C3 to Calvert, Texas. This proposal was technically defective because it did not comply with the applicable minimum spacing requirements set forth in Section 73.207(b) of our Rules. Subsequently, in the *Report and Order*, this counterproposal was dismissed at the request of Calvert Broadcasting in accordance with Section 1.420(j) of our Rules.[14]

15. The second counterproposal was filed by Bennet Broadcasting, Inc. ("Bennet Broadcasting"), then licensee of Station KAMV, Channel 222A, Victoria, Texas, proposing the substitution of Channel 221C3 for Channel 222A at Victoria, and modification of its Station KAMV license to specify operation on Channel 221C3. To accommodate this upgrade, Bennet Broadcasting also proposed the substitution of Channel 281A for Channel 221A at Kenedy, Texas, and the substitution of Channel 265A for 281A at George West, Texas. Thereafter, Bennet Broadcasting filed a Request for Withdrawal of its counterproposal pursuant to an agreement with KRTS in which KRTS would reimburse Bennet Broadcasting for its reasonable and prudent expenses incurred in preparation and prosecution of its counterproposal. Included in that submission was a statement from the president of Bennet Broadcasting that he "was persuaded by F.W. Hannel" to file its counterproposal and related documents. The president of Bennet Broadcasting further stated that he "now believes that he was probably used by Hannel in an improper attempt to obstruct the proposed upgrade of KRTS(FM)." That statement also referenced a contingency arrangement in which if Bennet Broadcasting obtained the upgrade for Station KAMV, Hannel would receive additional compensation. In view of that arrangement, KRTS also agreed to defend and indemnify Bennet Broadcasting against any claims which Hannel may assert.[15] In the *Order to Show Cause*, 7 FCC Rcd 2109 (1992), the staff granted Bennet's Request for Withdrawal.

16. In her Application for Review, Casey requests that we reverse both staff actions approving the withdrawal of the Calvert Broadcasting and Bennet Broadcasting counterproposals. In support of this argument, Casey refers to her earlier pleading, Comments in Response to Request for Withdrawal of Documents, in which she contended that both the Calvert Broadcasting and Bennet Broadcasting counterproposals were "disingenuous" and that the Commission should promptly resolve this proceeding and then conduct an independent inquiry into the facts and circumstances surrounding the Calvert Broadcasting and Bennet Broadcasting counterproposals and the settlement agreements.

17. We have carefully reviewed the staff actions permitting withdrawal of the Calvert Broadcasting and Bennet Broadcasting counterproposals. We conclude that both actions were in accord with Section 1.420(j) of the Rules and that there is no justification for reversing these actions or setting aside the Station KRTS upgrade at Seabrook, Texas.

18. Calvert Broadcasting agreed to withdraw its counterproposal as part of the settlement in a civil suit in which KRTS was a party. The settlement entailed withdrawal of various pleadings filed with the Commission in connection with this and other allotment rulemaking proceedings. Calvert Broadcasting did not receive any money or future consideration in exchange for its withdrawal. A copy of this settlement was filed with the Commission. As discussed earlier, the Bennet Broadcasting withdrawal was pursuant to a settlement with KRTS in which Bennet Broadcasting would receive $9,300 and indemnification with respect to any liability under a contingency arrangement with F.W. Hannel. The $9,300 in expenses was documented in accordance with Section 1.420(j) of the Rules and the provision for indemnification is now moot in view of Hannel's action cancelling the contingency arrangement.

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[12] At the time Casey filed this proposal, the coordinates for the alternate site were short-spaced to the reference coordinates of the Channel 222C2 allotment at Livingston, Texas, in contravention of Section 73.208 of the Rules.

[13] Section 73.215 of the Rules permits an FM applicant, in some instances and on the basis of contour protection, to propose a site not complying with the minimum spacing requirements set forth in Section 73.207 of the Rules.

[14] Section 1.420(j) of the Rules requires a party to file a request for withdrawal or dismissal of its proposal or expression of interest in an allotment rule making proceeding. Included in that request must be a certification that the party withdrawing has not received and will not receive money or consideration for the withdrawal or dismissal in excess of its prudent and legitimate expenses. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes* ("*Abuses of the Commission's Processes*"), 5 FCC Rcd 3911 (1990), *recon. denied* 6 FCC Rcd 3380 (1991).

[15] In a subsequent settlement of a civil suit in the United States District Court for the Southern District of Texas, Hannel agreed to cancel the contingency arrangement.

19. Notwithstanding the fact that the parties have agreed to withdraw certain pleadings, we remain concerned with an allegation of "disingenuous" proposals and the statement from the president of Bennet Broadcasting that he "now believes that he was probably used by Hannel in an improper attempt to obstruct" the proposed upgrade of Station KRTS. In considering these allegations, we first note that the Calvert Broadcasting counterproposal for a new Class C3 FM station for Calvert, Texas, and the Bennet Broadcasting counterproposal for a Class C3 upgrade for Station KAMV in Victoria, Texas, could have provided significant public interest benefits. Also, allegations of conduct coming within the ambit of *Abuses of the Commission's Processes* are directed against F.W. Hannel who is no longer a party to this proceeding. Consistent with *Abuses of the Commission's Processes,* Hannel did not and will not receive any consideration for the withdrawal of the Calvert Broadcasting counterproposal or his cancellation of the contingency arrangement with Bennet Broadcasting. Similarly, we are satisfied that Bennet Broadcasting did not receive any consideration in excess of its prudent and legitimate expenses and withdrew its counterproposal once it became aware of the possibility that its counterproposal was being used to obstruct a proposed upgrade for Station KRTS. In regard to KRTS, its efforts to resolve this proceeding in an expeditious manner and reach a settlement with other parties were in accord with *Abuses of the Commission's Processes.* Under these circumstances, we do not see any basis to consider the withdrawals of the Calvert Broadcasting and Bennet Broadcasting counterproposals further.

20. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Helen Maryse Casey IS DENIED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-316

In the Matter of

Amendment of Section 73.202(b), RM-7059
Table of Allotments,
FM Broadcast Stations.
(Rocky Mount, North Carolina)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1995; Released: August 29, 1995

By the Commision:

1. The Commission has before it an application for Review filed by New East Communications, Inc. ("New East"), licensee of Station WCZI-FM, Channel 252A, Washington, North Carolina, and Roanoke Chowan Broadcasting Corporation ("Roanoke Chowan"), licensee of Station WBCG(FM), Channel 252A, Murfreesboro, North Carolina, and a Motion to Dismiss and Opposition filed by Radio Triangle East Company ("Radio Triangle"). New East and Roanoke Chowan seek Commission review of the August 20, 1993, *Memorandum Opinion and Order,* 8 FCC Rcd 6206 (1993), wherein the staff, under delegated authority, affirmed the substitution of Channel 253C3 for Channel 253A at Rocky Mount, North Carolina, and the modification of Radio Triangle's Station WSAY-FM license to specify operation on the higher class channel. We agree with the Bureau's resolution of this case, and we affirm the Bureau's action denying the petition for reconsideration filed by New East and Roanoke Chowan and affirming the Bureau's action in the *Report and Order,* 6 FCC Rcd 2153 (1991).

2. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R. §1.115(g), the Application for Review filed September 30, 1993, by New East Communications, Inc. and Roanoke Chowan Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Conquest Telecommunications, Inc.	CC Docket No. 91-327
Com Systems, Inc.	CC Docket No. 91-329
International Pacific, Inc.	CC Docket No. 91-330
Peoples Telephone Co., Inc.	CC Docket No. 91-331
U.S. Long Distance, Inc.	CC Docket No. 91-335
Fone America, Inc.	CC Docket No. 91-368

ORDER

Adopted: August 9, 1995; Released: August 29, 1995

By the Commission:

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs specifying the rates, terms and conditions of the calls for which they provide operator services. TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require that OSP to demonstrate that its rates and charges are just and reasonable and to announce at the beginning of each call that its rates are available on request.

2. On November 8, 1991, the Common Carrier Bureau (Bureau) issued Orders directing several captioned operator service providers (OSPs) either to demonstrate the reasonableness of their rates or to reduce those rates, and to announce at the beginning of each call handled by the OSP that its rates are available on request.[1] On December 23, 1991, the Bureau issued a similar Order to Fone America, Inc., another OSP.[2] The Bureau imposed these requirements after reviewing the OSPs' rates and concluding that those rates appeared to be unjust and unreasonable. All of the OSPs subsequently amended their informational tariffs for operator-assisted calls.

3. Several captioned OSPs (Petitioners) filed applications for review[3] of the *Rate Review Orders* directed to it.[4] Petitioners contend those Orders violate the TOCSIA and the Administrative Procedure Act, 5 U.S.C. Section 551 *et seq.*, because the Bureau: (1) allegedly failed to consider each OSP's overall rates and charges; (2) allegedly neglected to consider certain cost data submitted by Petitioners; and (3) failed to conduct a separate rulemaking before adoption of these Orders. Petitioners also contend the *Rate Review Orders* denied them due process and required them to disclose certain proprietary data contrary to the Freedom of Information Act, 5 U.S.C. Section 552 *et seq.* Fone America also claims these Orders imposed rate-of-return regulation on OSPs, contrary to the policies of the Congress and this Commission. Fone America Application at 7.

4. After each of the Petitioners reduced its rates for interstate calls, the Bureau terminated the proceeding involving that OSP.[5] Therefore, consistent with our disposition of other similar applications for review in the past,[6] we dismiss as moot the Petitioners' applications for review.

5. Accordingly, IT IS ORDERED that the applications for review filed by Peoples Telephone Co., Inc. and Fone America, Inc., and the joint application for review filed by Conquest Telecommunications, Inc., Com Systems, Inc., International Pacific, Inc., and U.S. Long Distance, Inc., ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] Conquest Telecommunications Services, CC Docket No. 91-327, 6 FCC Rcd 6727 (Com. Car. Bur. 1991); Com Systems, Inc., CC Docket No. 91-329, 6 FCC Rcd 6727 (Com. Car. Bur. 1991); International Pacific, Inc., CC Docket No. 91-330, 6 FCC Rcd 7633 (Com. Car. Bur. 1991); Peoples Telephone Company, Inc., CC Docket No. 91-331, 6 FCC Rcd 6658 (Com. Car. Bur.1991); U.S. Long Distance, Inc., CC Docket No. 91-335, 6 FCC Rcd 6683 (Com. Car. Bur. 1991).

[2] Fone America, Inc., CC Docket No. 91-368, 7 FCC Rcd 181 (Com. Car. Bur. 1991) (with Orders referenced in note 1, collectively, *Rate Review Orders).*

[3] The captioned OSP Petitioners, along with Capital Network Systems, Inc., also sought stays of the announcement requirement. In January 1992, the Commission denied those requests. Capital Network Systems, Inc., et al., CC Docket No. 91-326, *et al.*, 7 FCC Rcd 906 (1992).

[4] On November 25, 1991, Conquest Telecommunications, Inc., Com Systems, Inc., International Pacific, Inc., and U.S. Long Distance, Inc. jointly filed a pleading captioned, "Application for Expedited Review." Also, on December 9, 1991, and January 22, 1992, Peoples Telephone Co., Inc., and Fone America, Inc., respectively, filed their applications for review. No responsive pleadings were filed.

[5] *See* Conquest Telecommunications Services, CC Docket No. 91-327, 7 FCC Rcd 66 (Com. Car. Bur. 1991); Com Systems, Inc., CC Docket No. 91-329, 7 FCC Rcd 67 (Com. Car. Bur. 1991); International Pacific, Inc., CC Docket No. 91-330, 7 FCC Rcd 7662 (1992); Peoples Telephone Company, Inc., CC Docket No. 91-331, 7 FCC Rcd 1023 (Com. Car. Bur. 1992); U.S. Long Distance, Inc., CC Docket No. 91-331, 7 FCC Rcd 73 (Com. Car. Bur. 1991); and Fone America, Inc., CC6) Docket No. 91-368, released April 14, 1995 (DA 95-821). In each of these Orders, the Bureau terminated the applicable proceeding, which also eliminated the announcement requirement.

[6] *See, e.g.*, American Network Exchange, Inc., *et al.*, CC Docket No. 91-365, *et al.*, 8 FCC Rcd 1198 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-141

In the Matter of

Amendment of Section 73.202(b) RM-8642
Table of Allotments,
FM Broadcast Stations.
(Frederiksted, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1995; Released: August 31, 1995

Comment Date: October 23, 1995
Reply Comment Date: November 7, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jose J. Arzuaga ("petitioner"), proposing the allotment of Channel 298B1 at Frederiksted, Virgin Islands, as the community's third local FM transmission service.[1] Petitioner states his intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration since it could provide the community with its third local FM transmission service. An engineering analysis has determined that Channel 298B1 can be allotted to Frederiksted in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction[2]

3. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Frederiksted, Virgin Islands	253A, 278A	253A, 278A, 298B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1995**, and reply comments on or before **November 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Oyster, Esq.
Route 1, Box 203A
Castleton, Virginia 22716
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] We note that pursuant to MM Docket No. 91-259, Channel 253A has been recently allotted to Frederiksted, Virgin Islands, as the community's second local FM transmission service. *See* 60 FR 33144, June 27, 1995.

[2] The coordinates for Channel 298B1 at Frederiksted are North Latitude 17-42-48 and West Longitude 64-53-00. We note that Station WAHQ(FM), Channel 299B, Carolina, Puerto Rico, has an application (BPH-950509ID) pending to modify its transmitter site which conflicts with the instant proposed rule making. However, where an application and an earlier or simultaneously filed petition for rule making conflict, and the conflict cannot be resolved by a site restriction or the allotment of an alternate channel, the application will be held in abeyance pending the outcome of the rule making. *See Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 (1993).

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr., d/b/a REM MALLOY BROADCASTING	File No. BPH-880627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L. Baker, d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC.	File No. BPH-860703MH

For Construction Permit for a New Station on Channel 275A, Raleigh, North Carolina

Appearances

Mark J. Prak, on behalf of Henry R. Malloy, Jr., d/b/a Rem Malloy Broadcasting; *Gary S. Smithwick*, on behalf of Peebles Broadcasting Company; *Michael J. Wilhelm*, on behalf of James S. Lee and Donald L. Baker, d/b/a Interactive Media; Lawrence J. Bernard, Sr., on behalf of Bernard Dawson; *Robert J. Buenzle*, on behalf of Special Markets Media, Inc., and *Robert Zauner*, on behalf of Chief, Mass Media Bureau.

SECOND FURTHER SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 28, 1995; Released: August 31, 1995

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order, 9 FCC Rcd 4822 (Rev. Bd. 1994), the Review Board remanded this proceeding and added the following issue against Rem Malloy:[1]

> (a) To determine whether Rem Malloy Broadcasting has continued to be financially qualified since filing its application to construct and operate an FM broadcast station in Raleigh, North Carolina, and, if not, the effect thereof on its basic qualifications.

2. A prehearing conference was held at the Commission's offices in Washington, D.C. on November 2, 1994, to rule on discovery requests. See Order, FCC 94M-593, released October 27, 1994. A hearing on Issue (a) was held on January 31, 1995, in the Commission's offices in Washington, D.C. (See Tr. 2546-2735). During the hearing session, the Presiding Judge, sua sponte, added the following additional issues against Rem Malloy:

> (b) To determine whether Henry R. Malloy, Jr., made misrepresentations or was lacking in candor with the Commission with respect to testimony and pleadings concerning Rem Malloy Broadcasting's continuing to be financially qualified since it filed its application, and, if so, the effect thereof on Rem Malloy Broadcasting's basic qualifications to be a Commission licensee.
>
> (c) To determine whether Rem Malloy Broadcasting has violated Section 1.65 of the Commission's Rules by failing to report material information concerning its financial qualifications, and, if so, the effect thereof on its basic qualifications to be a Commission license.[2]

3. The record was closed at the conclusion of the hearing session held on January 31, 1995, and March 16, 1995, was established as the date for filing proposed findings, and March 30, 1995, for any replies thereto. See Order, FCC 95M-36, released February 6, 1995. When it appeared that this case would be settled, the Presiding Judge extended the date for filing proposed findings to March 30, 1995, and the date for any replies to April 30, 1995. See Order,

[1] The Review Board also specified a financial issue against Free Air Corporation (Free Air). The full Commission, in Memorandum Opinion and Order, 10 FCC Rcd 503 (January 9, 1995), dismissed on procedural grounds a request for extraordinary relief filed by Free Air, and dismissed as moot Free Air's related motion to stay. By Memorandum Opinion and Order, FCC 95M-48, released February 14, 1995, the Presiding Judge dismissed a "Motion to Delete Issue" filed by Free Air. Also, in Memorandum Opinion and Order, FCC 95M-60, released February 23, 1995, the Presiding Judge dismissed with prejudice Free Air's application for failing to comply with the Presiding Judge's procedural order. By *MO&O* released May 5, 1995, (FCC 95R-08), the Review Board affirmed the dismissal of Free Air's application for failure to prosecute. On May 25, 1995, Free Air filed an application for review with the Commission, which is currently pending.

[2] The specific language of the issues was contained in an *Order*, FCC 95M-36, released February 6, 1995. For ease of reference, they are labelled Issues ([b] and [c].

95M-76, released March 17, 1995, and *Order*, 95M-86, released March 28, 1995. Unfortunately, the parties were not able to agree on a global settlement.

FINDINGS OF FACT

Financial Issue

4. In his application filed on June 27, 1986, Malloy certified that he was financially qualified to construct his proposed station and operate it for three months without revenue. See Tr. 2659-2660; *Rem Malloy Broadcasting*, 8 FCC Rcd 7923, ¶ 4. (Rev., Bd. 1983). At that time, Malloy estimated that his costs of construction and operation would be $175,526. Malloy 94 R Ex. 1, p. 1. He relied on his father, Henry R. Malloy, MD. (Dr. Malloy), to provide him with the needed funds. *Id.* Dr. Malloy signed a letter dated June 16, 1986, indicating his willingness to loan his son $250,000. *Id.*, p. 7. Malloy prepared a financial statement dated June 16, 1986, for Dr. Malloy which showed that he had net liquid assets of about $215,000. Tr. 2573, 2651, 2674; Malloy 94R Ex. 1, p. 9; Tr. 2589.

5. Before filing his application in 1986, Malloy discussed the Commission's "net liquid assets" standard for determining financial qualifications with his attorney and understood that in order to be found financially qualified, an applicant was required to demonstrate the availability of funds from assets which could be sold quickly, that is, cash and cash equivalents such as stocks, and that liabilities would be subtracted from the total of the assets to reach a "net liquid assets" figure. Tr. 2569-2571, 2588, 2608. When he certified to the Commission that he was financially qualified in 1986, Malloy relied solely on the loan letter from his father and his father's financial statement showing net liquid assets of about $215,000. Tr. 2602, 2634.

6. The liquid assets listed on Dr. Malloy's June 16, 1986, financial statement were as follows (Malloy, 94R Ex. 1, p. 9):

Cash	$ 1,100.00
RJR Stock	$149,250.00
FUNB Stock	$ 28,772.25
Sea Land Stock	$ 6,720.00
Kemper Investment	$ 46,696.21
TOTAL	$232,538.46

The Kemper Investment listing was an annuity. Tr. 2726.

7. On July 18, 1988, the Commission released its *Hearing Designation Order* in this proceeding and ordered Malloy to amend his application to specify a new transmitter site. Malloy 94R Ex. 1, p. 1. Malloy had originally proposed to use an existing tower for his antenna, but the new site he obtained required the construction of a new tower. *Id.* As a result, his projected costs of construction and operation increased from the $175,000 he had estimated in 1986 to about $364,000. *Id.*, pp. 1-2. Malloy showed his new cost projections to his attorney on or about August 15, 1988. *Id.*, p. 2.

8. On August 17, 1988, Malloy met with his father to discuss Dr. Malloy's continued willingness to provide financial support for the project. *Id.* They prepared another financial statement for Dr. Malloy, which demonstrated that his liquid assets had declined from the $231,438 figure shown on his 1986 financial statement to $79,717 and that his current liabilities were $24,261, leaving him with net liquid assets of $55,456. Tr. 2695; Malloy 94R, Ex. 1, pp. 2, 9 and 48. The latter figure was some $120,000 less than the $175,526 Malloy needed to construct and operate the facilities proposed in his 1986 application and some $308,000 less than the $364,000 needed to construct and operate the new facilities he was proposing to construct in 1988. Malloy conceded at hearing that his father's net liquid assets had decreased below the $175,000 needed to construct and operate his original proposal at some time between 1986 and 1988, but claimed he did not know when this had occurred. Malloy 94R Ex. 1, pp. 2-3; Tr. 2592-2594; 2598, 2608, 2622.

9. Dr. Malloy's August 13, 1988 financial statement showed liquid assets as follows (Malloy 94R Ex. 1, p. 48):

Cash	$ 7,458.00
RJR Stock	$60,000.00
FUND Stock	$12,259.00
TOTAL	$79,717.00

10. Dr. Malloy's 1986 federal tax return reveals that he had sold his Sea Land stock in 1986 for $6,720.00. Also, Dr. Malloy received $47,627.92 in the form of "fully taxable pensions, IRA distributions and annuities." Interactive 94R Ex. 1, p. 2. The 1987 federal tax return shows the sale that year of RJR Nabisco stock for $123,040.00 *Id.* The 1988 and 1989 federal tax return shows, respectively, the sale of RJR Nabisco stock on December 12, 1988 for $53,956.04, and the sale of RJR Nabisco stock on January 24, 1989 for $56,653.25. Also, the 1989 return shows the sale on March 7, 1989 of FUNB stock for $11,576.40. Interactive 94R Ex. 1, p. 2-3. Dr. Malloy's January 11, 1995 financial statement further reveals that as of that date, Dr. Malloy's liquid assets consisted of $1,500 in cash and $2,000 cash surrender life insurance. Dawson 94R Ex. 9, p. 2.

11. Malloy testified repeatedly in the 1995 hearing that, from June of 1986 until August of 1988, he had not spoken to his father about the latter's financial situation or assets[3] and was completely surprised to learn in August of 1988 that his father's net liquid assets had diminished so much. Malloy 94R Ex. 1, p. 2; Tr. 2574, 2579, 2592, 2598, 2677-2680. However, when questioned about the same matter at the 1989 hearing (before the financial issue was added), Malloy testified that he had reviewed his father's financial situation "over a period of time, quite consistent – quite constantly..." Tr. 106. Malloy's 1995 hearing testimony is also not believable for other reasons. Dr. Malloy and his son have a close personal relationship. Tr. 2692. Malloy is Dr. Malloy's only child, the sole heir of his estate and the executor of his estate. Tr. 2691. During the 1986-1988 period, Dr. Malloy sold assets to pay for surgery, buy a Cadillac, and to make improvements to his home.

[3] As discussed, *infra*, Dr. Malloy's liquid assets consisted primarily of stock.

Tr. 2702. Malloy was aware of Dr. Malloy's surgery, the improvements to his home and the new automobile. Tr. 2703-2704. Dr. Malloy also advanced funds to Malloy from time-to-time for various purposes, including the payment of Malloy's legal fees and school tuition for Malloy's son. Tr. 2573, 2700-2701, 2716-2717.

12. In August 1988, Malloy obtained a bank letter from the NCNB National Bank stating the bank's willingness to lend Malloy $375,000 which would cover all the estimated costs for the station. Malloy 94R Ex. 1, p. 2. However, although Malloy filed an amendment to his application specifying a new transmitter site on August 18, 1988, that amendment did not change the financial section of his original application, and no amendment to the financial section has ever been filed. The findings establish that Malloy lost his reasonable assurance from his father before his changed technical proposal caused him to seek alternative financing from the bank. Thus, Malloy's amended financial proposal is acceptable only if Malloy could show good cause for the amendment (see *Board's Remand MO&O*, 9 FCC Rcd at 4825,, par. 15). See Tr. 2660, 2639. In the absence of such showing, the Presiding Judge rejected the bank letter as a basis for Malloy's financial qualifications. Tr. 2639-3640, 2729-2730, 2733-2734. Also, in a *Prehearing Order*, FCC 95M-23, released January 20, 1995, the Presiding Judge ordered Malloy to produce for cross-examination Susan M. McDonough, who signed December 1, 1993, and January 18, 1995, letters to Malloy from Nations Bank. Malloy did not produce Ms. McDonough for cross-examination, providing an additional basis for rejecting his offer of those letters into evidence. Tr. 2556-2557, 2733-2734.

Misrepresentation/Lack of Candor Issue

13. Malloy admits he knew as of August 17, 1988 that at some point between June of 1986 and August 1988 his father's net liquid assets had dipped below the $175,000 he needed to construct and operate the facilities originally proposed in his application filed in June of 1986. Malloy not only deliberately withheld that fact from the Commission until January 1995, the eve of the hearing, he falsely represented in a number of documents and in testimony discussed *below* that he had been continuously financially qualified from the date his application was filed in June of 1986.

14. When Malloy's deposition was taken in this proceeding on October 27, 1988, about 70 days after he had reviewed his father's August 17, 1988, financial statement, Malloy demonstrated that he was aware of the Commission's "net liquid assets" test for assessing financial qualifications. Dawson 94R Ex. 4, p. 4; Tr. 2611. He also stated that before filing his August 1988 amendment he had reviewed his father's August 17, 1988, financial statement and determined that he could no longer rely on his father's financial position, under the Commission's test, to meet the new costs for the facilities described in the amendment. Dawson Ex. R, 4, p. 6. Therefore, he went to a bank to secure a loan letter. *Id.* He was then asked (*Id.*):

> "Was the determination you made with respect to your father's abilities under the FCC's criteria - did that result *only* from increased costs, or did it result from a change in your father's financial position?" (Emphasis added)

Malloy responded: "It resulted from increased costs." *Id.* At hearing, Malloy admitted that the quoted deposition testimony was false because in fact, he had gone to the bank for two reasons: because of the increased costs of his amended proposal *and* because his father's net liquid assets had changed. Tr. 2606-2607.

15. On December 13, 1988, Malloy filed an opposition to a petition for enlargement of issues seeking the addition of financial qualification and reporting issues against Malloy. Dawson 94R Ex. 3. In an attachment to the opposition, Malloy declared, under penalty of perjury, that he had read it and that the facts stated therein were true. *Id.*, p. 13; Tr. 2595. Malloy's opposition is rife with misrepresentations concerning Malloy's financial qualifications. See p. 2, 5-12. The following quoted portions are examples:

> (a) Malloy's financial plan has been "maintained so as to provide a more than adequate cushion of available financial resources... Malloy's cushion has at all times exceeded the amount budgeted by a substantial margin." (pp. 5, 6)
>
> (b) "Malloy is presently and has been at all times financially qualified." (p. 7).
>
> (c) "[T]he filing of an amendment 'recertifying' Malloy's financial qualification was not necessary because Malloy was never unqualified." (8)

16. Malloy's testimony at the hearing concerning these and other misrepresentations to the Commission was marked by an unwillingness to be forthcoming and repeated attempts to evade and excuse his misconduct. With respect to Malloy's claims of an adequate "cushion", Malloy admits that when he certified his financial qualifications in 1986, he relied solely on his father's net liquid assets (Tr. 2602) and that he did not have a "cushion" of net liquid assets before he went to the bank in August 1988. Tr. 2602. Malloy also knew the Commission did not count non-liquid assets in assessing financial qualifications. Tr. 2608. Nevertheless, Malloy asserted that his statement in the opposition pleading was only "technically" not true. Tr. 2601. Malloy offers, in this regard, the claim that he believed when the statements were made that his father could have borrowed enough money to meet his projected 1986 costs. Tr. 2599-2602. Malloy offered no evidence as to his father's ability to borrow or even that his father was prepared to do so. Tr. 2602. In this connection, the valuations placed on the non-liquid assets listed in Dr. Malloy's 1986 financial statement was not based on an appraisal of such properties. Tr. 2675. Malloy's explanation, which is rejected, demonstrates his unwillingness to be candid with the Commission even at the hearing stage.

17. Similarly, Malloy admitted that use of the term "financially qualified" in the opposition pleading was intended to mean financial qualifications under the Commission standard. Tr. 2608-2609. Nevertheless, Malloy was only willing to concede that his statement that he was at all times financially qualified was only "apparently not" true and claims he "misunderstood" what he was representing. Tr. 2604-2605. Malloy also sought to excuse his statement concerning the need to file an amendment as a "misunderstanding, misreading of what is here because my belief is that we have been financially qualified." Tr. 2609. Malloy's candorless testimony is rejected as unworthy of belief.

18. At a hearing session held in this proceeding on January 9, 1989, Malloy testified that before he amended his application in 1988, he felt it was "prudent" to "seek out or identify additional sources of financing." Tr. 106. He explained this answer by saying (Tr. 106):

> I state now, and I believe then, that my father's resources were adequate, but I thought that it was an intelligent thing to do to create a consistent cushion in everything.

The record makes abundantly clear this testimony was not truthful.

19. On June 6, 1991, and on June 26, 1993, Malloy filed consolidated reply exceptions with the Review Board in response to exceptions filed by other applicants to the initial decisions. Dawson 94R Exs. 5 and 6. Both documents were filed on Malloy's behalf by his counsel who sent copies to Malloy. Tr. 2614. Malloy is sure he discussed the first sentence with counsel and also probably the second sentence. Tr. 2615-2616. The two documents contain a number of identical representations, including the following:

> (a) But Malloy established below that he never in fact "lost" his financing and was never financially unqualified. Dawson 94R Exs. 5, p. 4, and 6, p. 6.
>
> (b) In stark contrast to his opponents, Malloy has at all times been financially qualified. Dawson 94R Exs. 5, p. 5 and 6, p. 6.

Both representations were false. It is further found they were intentionally made notwithstanding Malloy's assertion to the contrary. See Tr. 2618.

20. On November 5, 1993, the Review Board released an *Order* directing Malloy to supplement the record regarding his financial qualifications. Dawson Ex. 7, p. 1. In response, on December 4, 1993, Malloy filed a Supplemental Submission Regarding Financial Qualifications (Submission). *Id.* Malloy assisted his counsel in obtaining documents and preparing the submission. Tr. 2620-2621. In the Submission, Malloy claimed that he had established:

> beyond any doubt, that Malloy was financially qualified when he filed his application in 1986, remained financially qualified in 1988 when he changed sites and modified his financial plans and remains demonstrably qualified today. Dawson 94R Ex. 7, p. 4.

Furthermore, Malloy claimed in the Submission that it contained "a comprehensive analysis of Malloy's qualifications at each state of the application process." *Id.* The record reflects that this statement, like so many other representations to the Commission, was false.

21. Malloy's declaration, executed under penalty of perjury on December 2, 1993, was attached to the Submission. Dawson 94R Ex. 8. In his declaration, Malloy stated that the steps he took in determining his financial qualifications were summarized in his Opposition to Petition to Enlarge Issues filed on December 13, 1988. *Id.*, p. 1. The falsity of that document is treated in paragraph 15-17 of these findings. Malloy testified that he included the reference to his 1988 Opposition in his 1993 declaration for the purpose of telling the Review Board that the Opposition remained true. Tr. 2625. He then admitted that some of the statements in the 1988 Opposition were not true, but nonetheless claimed, as in earlier instances, discussed, above, that he did not know at the time he signed the declaration that he was not financially qualified. Tr. 2636.

22. Malloy's 1993 declaration also contained the following sentence (Dawson 94R Ex. 8, p. 2):

> Because the cost of implementing my revised [1988] proposed construction and operating budget would exceed my father's net liquid assets, I decided [in August of 1988] to seek out a reasonable assurance of bank financing which could supplement or serve as a substitute for my father's willingness to loan me money depending on the circumstances which might actually be presented if I were awarded the permit.

Malloy conceded at trial that there was another reason he sought bank financing in 1988: his father's net liquid assets had dipped below the amount he needed to construct his original proposal. Tr. 2627. He was unable to explain why the latter reason was not included in the declaration and admitted that its inclusion would have made the declaration more accurate. Tr. 2628.

Section 1.65 Issue

23. Section 1.65 requires that applicants report significant changes in the information in their applications and substantial changes in any other matter having decisional significance within thirty days of the change. Malloy admits that he knew in August 1988 that his father's net liquid assets (Malloy's sole source of financing) had decreased below the amount needed to implement his original proposal. Malloy 94R Ex. 1, pp. 2-3; Tr. 2592-2594, 2598, 2608, 2622. However, Malloy never reported this decisionally significant information. Instead, he concealed that fact from the Commission until the eve of the hearing. Also he falsely represented in his opposition pleading filed December 13, 1988 that a Section 1.65 issue was not warranted since no material change in his application had occurred. In this regard, Malloy asserted:

> ... it is clear that Malloy has not failed to report any material change in its application. Malloy was financially qualified. He changed his tower site and construction estimates in order to be prepared to build a tower. He secured an additional source of financing. He continues to be financially qualified...
>
> No act occurred that caused Malloy to be financially unqualified. Accordingly, it was not necessary for him to amend his application to certify that he continued to be financially qualified. (Dawson 94R Ex. 3, pp. 9-10).

Malloy's active concealment as well as his repeated false representations concerning the diminution in his father's assets requires a finding that his failure to comply with his Section 1.65 obligations was intentional, warranting disqualification.

CONCLUSIONS

Financial Issue

24. The issue seeks a determination whether Malloy has continued to be financially qualified since filing his application in 1986. The answer is no. The findings compel the conclusion that Malloy became financially unqualified sometime in 1987 when Malloy's father's net liquid assets dipped well below the $175,000 needed to implement the 1986 proposal and continues to be financially unqualified up to the present time. In August 1988 Malloy obtained a bank letter covering all the then estimated costs to the proposed station. However, Malloy never sought leave to amend the financial section of the application. Absent a showing of good cause for acceptance of the changed financial proposal, the proffered bank letter has been rejected and can not be considered as a basis for Malloy's financial qualifications. Rejection of the 1988 bank letter moots the need for consideration of the viability of subsequent bank letters secured by Malloy in 1983 and 1985. The latter bank letters were also rejected because of Malloy's refusal to produce for cross-examination the bank official who signed the letters on behalf of the bank. In sum, since Malloy's father's net liquid assets fall well short of the amount needed to implement the 1986 proposal as well as the added costs required by the 1988 proposed facilities ($364,000), Malloy is not financially qualified and Malloy's application must be denied.

Misrepresentation Issue

25. The findings catalogue a list of misrepresentations and concealment of pertinent facts so transparent, frequent and egregious as to foreclose any implication whatsoever that it arose from inadvertence, mistake or confusion on behalf of Malloy. The most damning misrepresentation documented in this record is Malloy's oft repeated assertion to the Commission that Malloy has been continuously financially qualified from the inception of this proceeding in 1986. Even assuming the most favorable version of Malloy's supposed belief -- his story that he first learned in August 1988 that his father's net liquid assets had decreased below the amount needed to implement the 1986 proposal -- there is no conceivable way, thereafter, that he could truthfully claim he has always been financially qualified. Ample motive for Malloy's misrepresentations is documented in the record. He simply did not want the Commission to know that he had become financially unqualified. Also, he wanted to conceal the fact that he had failed to disclose that information in a timely fashion. Coupled with Malloy's candorless testimony, it is abundantly clear that Malloy is not fit to be a Commission licensee and his application must be denied on character grounds.

Section 1.65 Issue

26. Malloy's knowing violation of the Commission's reporting requirements also compels the denial of his application. The record leaves no doubt that Malloy's failure to comply was intentional. Malloy knew he had lost his financing. There was ample motive to conceal that fact from the Commission. Indeed, the same motive underlay his failure to petition to amend his application to substitute financing sources. Malloy knew that disclosure risked the denial of such amendment (and his application) because of lack of diligence.

Accordingly, IT IS ORDERED, That unless an appeal from the Second Further Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[4] the application of Henry R. Malloy, Jr., d/b/a Rem Malloy Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

[4] In the event exceptions are not filed within 30 days after the release of this Second Further Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Second Further Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-142

In the Matter of

Amendment of Section 73.202(b),	RM-8685
Table of Allotments,	
FM Broadcast Stations.	
(Zapata, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1995; Released: August 31, 1995

Comment Date: October 23, 1995
Reply Comment Date: November 7, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Arturo Lopez ("petitioner"), requesting the allotment of Channel 228A to Zapata, Texas, as the community's first local aural transmission service. Petitioner states he will apply for Channel 228A, if allotted.[1]

2. We believe petitioner's proposal warrants consideration since it could provide Zapata[2] with its first local FM service. Channel 228A can be allotted to Zapata in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] Since Zapata is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government will be solicited.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Zapata, Texas	--	228A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1995**, and reply comments on or before **November 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arturo Lopez
1401 West Main Street
Rio Grande City, Texas 78582
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although petitioner's request indicates that the original copy of his proposal was signed, petitioner failed to include a affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirement of Section 1.52 regarding subscription and certifications. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.42 (1990). Petitioner is requested to rectify this omission in his comments.

[2] According to the 1990 U.S. Census, Zapata is a Census Designated Place with a population of 7,119 persons.

[3] The coordinates for Channel 228A at Zapata are North Latitude 26-54-30 and West Longitude 99-16-18.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ROBERT J. MACCINI, RECEIVER
Assignor

and File Nos. BAL-930305EE
BALH-930305EF

ARITAUR COMMUNICATIONS, INC.
Assignee

For Assignment of Licenses of
WBEC(AM)/WBEC-FM, Pittsfield, MA

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1995; Released: August 31, 1995

By the Commission:

1. Before the Commission for consideration are: the letter of March 18, 1994 , by the Chief, Audio Services Division, Mass Media Bureau, which denied an objection filed by William L. Whitely ("Whitely") to the grant of the above-captioned application assigning the licenses of WBEC(AM)/WBEC-FM, Pittsfield, Massachusetts to Aritaur Communications, Inc. ("Aritaur"); an application for review filed by Whitely on April 18, 1994; and Aritaur's opposition to Whitely's application for review.[1]

2. On May 3, 1993, the Commission issued a Public Notice announcing the grant of an application to assign the licenses of WBEC(AM)/WBEC-FM, Pittsfield, Massachusetts from Robert J. Maccini, Receiver ("Maccini") to Aritaur. On June 8, 1993, Whitely submitted an objection and "request to revoke the grant" of the application to assign the licenses of WBEC(AM)/WBEC-FM to Aritaur. The staff of the Mass Media Bureau addressed the matters raised by Whitely as an informal request for reconsideration.

3. We find that Whitely's pleading should have been dismissed by the Bureau as untimely.[2] Whitely's objection was filed more than 30 days after the Commission had issued its public notice of the grant of the assignment application.47 U.S.C. § 405 requires that a petition for reconsideration must be filed within thirty days from the date of the Public Notice announcing the grant of an application. Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not, with one narrow exception, waive or extend the filing period. *See Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986). The narrow exception to this statutory filing period allows the Commission to extend or waive the 30 day-filing period in an "extraordinary case" where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought. *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). Whitely was not a party to the application, and the exception in *Gardner* is not applicable. *See, e.g., Reuters*, at 951-52.

4. Moreover, Whitely does not identify himself as a resident of the stations' service areas, as a listener, or as a competitor of the stations and has not demonstrated that he is aggrieved by the Bureau's action granting this assignment application. Therefore, Whitely lacks standing to file an application for review pursuant to 47 C.F.R. § 1.115(a). *See High Country Communications*, 4 FCC Rcd 6237 n.2 (1989). In any event, Whitely's application for review raises no public interest concerns and we find no basis on which to reverse the Bureau's grant of the assignment application.

5. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed April 18, 1994 by William L. Whitely IS HEREBY DISMISSED. The Second Supplement to Application for Review filed on September 6,1994 and the Reply to Aritaur's Opposition to the Second Supplement and Third Supplement to Application for Review filed on September 28, 1994 ARE HEREBY DISMISSED as unauthorized pleadings pursuant to 47 C.F.R. § 1.115(d) and 47 C.F.R. § 1.45(c). Aritaur's opposition to the Second Supplement to Application for Review filed on September 15, 1994, and Aritaur's Motion to Strike filed October 7, 1994 ARE HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Additionally, Whitely filed a "Second Supplement to Application for Review" on September 6, 1994. Aritaur filed an opposition to this pleading on September 15, 1994. Thereafter, Whitely filed a pleading captioned "Reply to Aritaur's Opposition to the Second Supplement and Third Supplement to Application for Review." Aritaur filed a motion to strike this pleading. Whitely's Second Supplement to Application for Review and his Reply to Aritaur's Opposition to the Second Supplement and Third Supplement to Application for Review are unauthorized pleadings, and will be dismissed. *See* 47 C.F.R. § 1.115(d), 47 C.F.R. § 1.45(c). *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988). Aritaur's opposition to the Second Supplement to Application for Review and its Motion to Strike will be dismissed as moot.

[2] Whitely's application for review includes copies of a Supplement to Opposition, dated September 21, 1993, and a Second Supplement to Opposition, dated September 27, 1993. Whitley asserts that these pleadings were filed in connection with his initial objection and request for revocation of the grant assignment application and faults the Bureau staff for failing to consider these pleadings. However, like the initial objection, these pleadings were also untimely and therefore subject to summary dismissal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CUID No. WI0286 (Manitowoc)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1995; Released: August 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry,h) explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN LINE SERVICES, INC.,
Complainant,

v.

EMI, INC. File No. E-92-63
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1995; Released: August 30, 1995

By the Deputy Chief (Operations), Enforcement Division, Common Carrier Bureau:

1. We have before us a complaint filed by American Line Services, Inc. (ALS) against EMI, Inc. (EMI) on April 30, 1992.[1] As part of the complaint, ALS has sought damages for what it alleges are violations of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). As discussed below, ALS's claim for damages is barred by the running of the statute of limitations in Section 415 of the Act, and we therefore dismiss the complaint.[2]

I. BACKGROUND

2. ALS is a non-dominant reseller of interstate private line telephone services that obtains its transmission facilities from an underlying carrier rather than constructing its own facilities. EMI, on the other hand, is a facilities-based provider of interstate telephone services utilizing microwave radio and other transmission facilities. EMI leases these facilities to other carriers on a wholesale basis, as well as to the general public on a retail basis in competition with other carriers like ALS. On or about April 1, 1987, ALS entered into an agreement with EMI to obtain voice-grade circuits between Boston, Massachusetts and New York City. EMI offered to supply two kinds of service: DS-1 ("digital T-1") service and "Transmuxed" T-1 ("analog T-1")[3] service between New York and Boston and ALS elected to receive the latter. Under the agreement, ALS was originally required to lease a minimum of 28 analog T-1 circuits for a five-year term. This requirement was subsequently reduced by mutual agreement to a minimum of 13 analog "T-1s." Pursuant to the written agreement, the price charged by EMI varied from a high of $1878 per month per T-1 circuit to a low of $1235 per month during the last year of the agreement. The agreement also contained a clause which, in essence, stated that EMI would charge ALS a fair market price for services performed under the contract. Additionally, this clause stated:

> If the customer can present a bona fide written offer from a FCC regulated microwave common carrier or a fiber optic common carrier of a price less than the price carrier currently charges, Customer Carrier agrees to reopen price negotiations. If the parties cannot agree on a price, Customer may cancel the circuits for which the offer exists.[4]

3. In September 1986, ALS entered into negotiations with Cable and Wireless, Inc. (C&W) whereby ALS would provide C&W with 10 T-1 circuits on a resale basis. C&W was a customer of EMI at that point. In January 1982, C&W agreed to lease 10 T-1 circuits for $2500 per circuit per month from ALS and notified EMI that it would not renew its prior agreement with EMI. ALS claims that it believes that EMI, apparently in response to ALS's proposed agreement with C&W, counter-offered that it would match ALS's price plus provide free bypass services for all traffic terminated in New York City and Boston.[5] In addition, ALS claims that EMI did not require C&W to commit to a multi-year service term or require C&W to order a minimum number of circuits. Additionally, ALS alleges that approximately in May of 1987, EMI began discounting the T-1 rate to C&W.[6]

4. ALS alleges that, as a result of what it claims was EMI's discriminatory, unjust, and unreasonable pricing practices, C&W canceled its proposed service contract with ALS. ALS then brought an action against EMI in Norfolk County Superior Court, Massachusetts in March 1988 alleging wrongful interference with an alleged contract with C&W and wrongful inducement and unfair and deceptive practices within the meaning of Massachusetts law. In response to that complaint, EMI removed the action to Federal District Court in Massachusetts on diversity grounds and counterclaimed for unpaid amounts due under its contract with ALS. The case was dismissed because of ALS's failure to attend a scheduled conference and respond to information requests. ALS obtained new counsel who revived the case and filed an amended complaint on June 21, 1991. At the commencement of the trial, EMI moved to dismiss for lack of subject matter jurisdiction on the ground that each count of ALS's state claims rested on specific allegations of unjust and unreasonably discriminatory conduct that were within the exclusive jurisdiction of the Federal Communications Commission to resolve. The Court denied the motion determining that the case

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[1] Both parties have changed their corporate names since the complaint was filed. ALS was originally know as American Private Line Services, Inc. and EMI was known as Eastern Microwave Inc.

[2] Inasmuch as were are dismissing the claim for damages because of the statute of limitations, we need not address in this Order any of ALS's substantive allegations concerning violations of the Act by EMI.

[3] Transmux and digital refer to different types of transmission facilities. Transmuxed is a subdivided analog circuit that is upgraded electronically to more closely resemble true digital technology. In this instance, ALS ordered the Transmuxed circuits subdivided to voice-grade level rather than an unsubdivided T-1 circuit.

[4] Agreement at 4.

[5] Complaint at 3.

[6] *Id.*

was primarily one of breach of contract and unfair business practices, but did grant EMI's motion for a directed verdict.[7]

II. CONTENTIONS OF THE PARTIES

A. EMI

5. EMI contends that the suit brought by ALS against EMI in state court in Massachusetts in 1988 is essentially the same cause of action that it has now brought to the FCC under the guise of an unreasonable discrimination charge. EMI maintains that this complaint is barred under both Sections 415(b) and (c)[8] of the Communications Act because the cause of action arose in 1988 and ALS did not bring its action here until 1992. Despite the fact that ALS has claimed it only became aware of the alleged discrimination within the year prior to the filing of this complaint,[9] EMI argues that this claim is belied by the fact that virtually all of the allegations in the instant complaint were raised in ALS's original state court complaint in 1988. Thus, EMI contends that ALS's own legal action indicates that it had knowledge pertaining to the facts of the instant complaint more than two years before this complaint was filed and that the claim for damages is therefore barred as a matter of law.

B. ALS

6. ALS states generally that EMI is wrong that the claim is barred by the statute of limitations. ALS reiterates, without any supporting evidence of legal authority, that it did not learn of EMI's discriminatory pricing practices until the summer of 1991 when EMI produced documents during the course of pre-trial discovery in the District Court proceeding. ALS does not refute any of the specific allegations raised or documentation supplied by EMI in its Answer and Motion To Dismiss as support for its argument that ALS's claim for damages is time barred.

III. DISCUSSION

7. After having carefully considered the arguments of the parties, we find that ALS's entire claim for damages has been barred by the running of the statute of limitations in Section 415 of the Act. We therefore grant EMI's motion to dismiss.

8. Although ALS has claimed that it only became aware of the alleged discrimination within the year before the filing of this complaint, an examination of its complaints filed against EMI in Massachusetts state court in 1988 and the federal district court belie this fact.[10] The statement of facts and narrative of the business relationship among ALS, EMI, and C&W that is contained in the 1988 court papers is identical with that contained in ALS's instant complaint.[11] Thus ALS's own legal action indicates that it had knowledge pertaining to the facts of the instant complaint more than two years before it was filed here.

9. Generally, the point of accrual is when the unlawful act occurs, or when the carrier does the unlawful act or fails to do what law requires.[12] Under the Communications Act, that point is when the complainant, through the exercise of reasonable diligence, discovered or should have discovered the defendant's wrong or uncovered the operable facts.[13] Although ALS claimed that it only became aware of the alleged discrimination in the year before it filed this complaint,[14] it has presented to us nothing that would refute EMI's claim that ALS clearly had knowledge as early as 1987 of material facts which put it on notice of the alleged discriminatory conduct, nor has it presented any probative support for its claim that it did not learn of the alleged discrimination until 1991. Moreover, as evidenced by ALS's letter to EMI in Exhibit E of the Answer, ALS was fully aware of the competitiveness of the market and through the exercise of reasonable diligence could have discovered the type of service offered to C&W and the price paid. Furthermore, the cause of action for overcharges has been determined to accrue when the customer receives a bill for services.[15] ALS received monthly bills from EMI beginning in December 1987, which it has failed to pay, and this date is certainly more than two years before it filed the instant complaint. Thus, ALS failed to provide any persuasive evidence or argument to support its claim that its complaint is timely filed within the meaning of Section 415 of the Act.[16]

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED pursuant to Section 415 of the Communications Act of 1934, as amended, 47 U.S.C. § 415, and authority delegated under 47 C.F.R § 0.291, that the Motion to Dismiss filed in the above-referenced complaint by EMI, Inc. IS GRANTED and this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief, (Operations)
Enforcement Division
Common Carrier Bureau

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[7] American Private Line Services v. Eastern Microwave, C.A. No. 88-1161-T, United States District Court for the District of Massachusetts (October 21, 1991).

[8] Sections 415 (b) and (c) state that all complaints for damages or claims for recovery of overcharges shall be brought within two years from the time the cause of action accrues.

[9] Complaint at 5.

[10] Answer, Exhibit A at paragraphs 17-21 and Exhibit B.

[11] Complaint at 2-4.

[12] *See* Armstrong Utilities, Inc. v. General Telephone of PA, 25 FCC 2d 386, 390 (1970); *see* also, Tele-Valuation, Inc., 73 FCC 2d 450, 452 (1979); Anchorage Telephone Utility v. Alascom, Inc., 4 FCC Rcd 2472, 2474 (1989).

[13] *See* Bunker Ramo Corp. v. Western Union, 31 FCC 2d 449, 454 (1971); Thornell Barnes Co. v. Illinois Bell Co., 1 FCC 2d 1247, 1254 (1965); Anchorage Telephone Utility, 4 FCC Rcd at 2474.

[14] Complaint at 5.

[15] Tele-Valuation, 73 FCC 2d at 452.

[16] *See* Valenti v. AT&T, 9 FCC Rcd 3306 (Com. Car. Bur. 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-48

In the Matter of

Amendment of Section 73.606(b), RM-8590
Table of Allotments,
TV Broadcast Stations.
(Weaverville, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 23, 1995; Released: August 30, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 10 FCC Rcd 4438 (1995), issued in response to a request filed by Mark C. Allen ("petitioner") proposing the allotment of UHF television Channel 32 to Weaverville, California, as that community's first local television broadcast service. Petitioner submitted late-filed supporting comments in response to the *Notice*.[1] No other comments were received.

2. Weaverville (population 3,370),[2] in Trinity County (population 13,063), is located approximately 269 kilometers (167 miles) northwest of Sacramento, California.

3. Based upon the petitioner's continuing expression of interest, we will allot Channel 32 to Weaverville since it could provide a first local television broadcast service to the community. As stated in the *Notice*, Weaverville is located within the prohibited co-channel distance separation of 174.5 miles (280.8 kilometers) from the Sacramento-Stockton, California, television market, one of the major market communities affected by the Commission's current freeze on the filing of petitions for rule making to amend the Television Table of Allotments, or applications therefor, in certain metropolitan areas.[3] Therefore, Channel 32 was proposed for allotment to Weaverville at a restricted site located 20.7 kilometers (12.9 miles) north of the community at coordinates 40-54-45 and 122-52-15, in conformity with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules. From the restricted site compliance with the terms of the freeze *Order* is met.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 16, 1995**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Weaverville, California	32

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments were not accompanied by a motion to accept. However, since this proceeding is uncontested, and the comments simply serve to reaffirm the petitioner's interest in pursuing the proposed allotment of Channel 32 at Weaverville, no prejudice will result from their acceptance. *See, Ellison Bay, Wisconsin*, 9 FCC Rcd 2327 (1994); *see also, Santa Isabel, Puerto Rico*, 3 FCC Rcd 2335 (1988).

[2] Population figures are from the 1990 U.S. Census.

[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346, published July 29, 1987 ("freeze *Order*").

[4] Prospective applicants should note that any application submitted for Channel 32 at Weaverville that does not specify a site beyond the prohibited co-channel distance separation noted above will not be accepted for filing during the interim freeze.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-66

In the Matter of

Amendment of Section 73.202(b) RM-8625
Table of Allotments,
FM Broadcast Stations.
(Dayton, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1995; Released: August 30, 1995

By the Chief, Allocations Branch:

1. At the request of Steven C. Hoffman ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 541 (1995), proposing the allotment of Channel 272A at Dayton, Washington, as the community's second local FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 272A at Dayton, Washington, since it would provide the community with an additional local FM transmission service. An engineering analysis has determined that Channel 272A can be allotted at Dayton in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.0 kilometers (1.9 miles) southwest to avoid short-spacings to the construction permit site for Station KRAO(FM), Channel 273C3, Colfax, Washington, and the licensed site for Station KORD(FM), Channel 274C, Richland, Washington.[2] Since Dayton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 16, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dayton, Washington	223C1, 272A

4. The window period for filing applications will open on **October 16, 1995**, and close on **November 16, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed and an address provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in his responsive comments, and has complied accordingly.

[2] The coordinates for Channel 272A at Dayton are North Latitude 46-17-57 and West Longitude 117-59-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 95-64

Cost Allocation Manual Revision
to Utilize a Statistical Sampling
System for Certain Technician
Groups Time Reporting

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1995; Released: August 30, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1 . On May 1, 1995, US West, Inc. filed on behalf of its telephone subsidiary, US West Communications, Inc. ("US West"), proposed cost allocation manual ("CAM") revisions to reflect changes in time reporting procedures. Specifically, US West proposes to use a sampling process for technician time reporting to replace its current time reporting process in which every technician completes daily time reports. In this Order, we grant conditional approval for US West to implement this sampled and verified employee reporting ("SAVER") process, subject to certain stipulations explained below.

II. BACKGROUND

2. US West proposes to use a statistical sampling methodology in lieu of the current method of positive time reporting[1] for certain installation and maintenance technicians.[2] US West states that under the new statistical sampling process, it would use random sampling techniques to select, on a daily basis, technicians who would be required to keep track of the time associated with the various work functions they perform. US West also states that each selected technician's supervisor would be responsible for collecting the technician's activity logs at the end of the day and for validating all entries. US West states further that a group of analysts would then translate the activity log data into the necessary financial information by also reviewing the activity logs and conducting follow-up telephone interviews with the technicians sampled. US West states that its SAVER process would reduce paperwork and provide more time for technicians to perform customer installations and repairs. US West has conducted parallel studies of technician time reporting and estimates that the impact of its SAVER process on total expenses will result in a minor expense shift from nonregulated to regulated operations.[3]

3. A Public Notice was issued on May 9, 1995, inviting interested parties to file comments on US West's CAM revision for SAVER by June 5, 1995, and reply comments by June 20, 1995.[4] No comments were filed.

III. DISCUSSION

4. For joint activities that are labor intensive, such as the installation and maintenance activities under consideration here, an accurate time reporting system is essential to prevent cross-subsidization. Until recently, we required carriers to use a 100 percent time reporting system for installation and maintenance personnel to achieve accurate accounting results. Beginning in 1992, however, we have approved carriers' use of sampling techniques when the carriers have demonstrated that their processes contained adequate controls and would yield accurate results. The sampling process US West proposes to use is very similar to the processes that we have already approved for Pacific Bell and the Ameritech Operating Companies.[5]

5. At our direction, US West engaged an independent auditor to audit the SAVER process to determine the validity of its statistical techniques and to evaluate the effects of the system on US West's accounting and cost allocation results.[6] US West engaged Price Waterhouse to perform this audit. Price Waterhouse concluded that US West's SAVER process is statistically sound, but recommended improvements in US West's activity log review process, training process and internal controls. US West has implemented these recommendations. Price Waterhouse has stated that these recommendations were implemented and that no further improvements are necessary.

6. We have reviewed Price Waterhouse's audit workpapers and conducted our own audit of the SAVER process. We conclude, based on this review and audit, that, if properly implemented, the SAVER process can provide reliable results. Therefore, we approve US West's proposed CAM change and permit US West to implement its SAVER process subject to the operational recommendations we have made as a result of our audit. These recommendations include requiring US West: to revise and implement proce-

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[1] In positive time reporting, each employee accounts for the hours worked in a given day by assigning increments of time to specific jobs or functions performed.

[2] US West proposes to implement SAVER for its installation and maintenance technicians and its distribution plant maintenance technicians. Installation and maintenance technicians generally perform repairs at customers' premises. Distribution plant maintenance technicians generally perform cable repairs.

[3] US West estimates that the shift from nonregulated to regulated operations would be $1.6 million. This is less than .003 percent of US West's total expenses for 1994. We believe an effect of this size is diminutive.

[4] US West, Inc. Files Revisions to its Cost Allocation Manual to Utilize a Statistical Sampling System for Certain Technician Groups Time Reporting, *Public Notice*, 10 FCC Rcd 5038 (Accounting and Audits Div. 1995).

[5] Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Memorandum Opinion and Order*, 7 FCC Rcd 3917 (Accounting and Audits Div. 1992) (*Pacific's ETDP Order*); Ameritech Operating Companies' Cost Allocation Manual Revisions to Utilize a Statistical Sampling Process for Technician Time Reporting, *Memorandum Opinion and Order*, 9 FCC Rcd 4024 (Accounting and Audits Div. 1994) (*Ameritech's ETDP Order*).

[6] *See* 47 C.F.R. §§ 32.14 & 32.23.

dures that comply with the Commission's rules for the treatment of incidental time; to require its technicians to have logs with them at the time of their interviews with the analysts; and to document what training the analysts have undergone regarding interview techniques, particularly for information gathering purposes.

7. Our approval of US West's CAM revision is limited to the use of the statistical sampling method for those technicians listed in footnote 2. US West must not make any changes to its SAVER process without our prior written approval. Further, we require US West to direct its independent auditors to conduct an audit of the SAVER process as part of the annual CAM audit required under Part 64.904 of the Commission's rules.[7] US West may implement this process as of September 1, 1995.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 220, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the cost manual revisions pertaining to Section VII, Positive Time Reporting, filed May 1, 1995, by US West ARE APPROVED subject to the conditions in paragraphs 6 and 7, above.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[7] 47 C.F.R. § 64.904.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Western Cable TV — CUID No. CA0282 (South San Francisco)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 2, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was served on Operator on February 24, 1994 and was received by the Commission on the same date. Operator previously had filed an FCC Form 393 on November 24, 1993 in response to a complaint that was sent to Operator on October 27, 1993. However, we have no record that this October complaint was ever filed with the Commission.[11] Therefore, we will consider February 24, 1994, the filing date of the first pending complaint on record, as the initial date of regulation for Operator's CPS tier. Operator also filed a supplemental Form 393 filing on April 11, 1995.

5. Operator asserts that its monthly CPS tier price of $12.70 (plus franchise fee) is justified by its benchmark filing because its price is lower than the maximum permitted charge of $12.77 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Part II of the Form, on Line 302 of Worksheet 3, Operator incorrectly entered the amount it reported on Line 106 of Worksheet 1 instead of the amount it reported on Line 206 of Worksheet 2. The instructions for Line 302 of FCC Form 393 state: "If you completed Worksheet 1 only, enter the number from Line 106, Column E. If you completed Worksheet 2, enter the number from Line 206, Column E." In this case, Operator completed Worksheet 2 and therefore should have entered the number from Line 206. We therefore adjusted Line 302 to equal the amount reported on Line 206 in accordance with the Form's instructions.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed a motion to dismiss this complaint. However, since we have no record that the complaint was ever filed, it is unnecessary to rule on this motion.

b. In its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of November 1993. However, the figures Operator used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Operator used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure released on August 31, 1993 for the third quarter of 1992 was 122.5. Operator's calculation of the Inflation Adjustment Factor is thus incorrect.

c. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. Since the Commission did not receive a complaint until February 24, 1994, we will recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available using February 1994 as the correct base date for determining inflation. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.039 as the Inflation Adjustment Factor through February 1994, the base date Operator could have chosen to use in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $12.58 per month (plus franchise fee) for the period from February 24, 1994 to May 14, 1994.[12] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $12.58 (plus franchise fee).[13]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[12] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of Blair County — CUID No. PA1526 (Greenfield Township, PA)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 2, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable CUID No. NY0400 (Newburgh, NY)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 2, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable Communications	CUID Nos. TX0621 and TX0676 (Houston, TX)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 2, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA1294
Borough of East Greenville, Pennsylvania

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1995; Released: June 6, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in the Borough of East Greenville, Pennsylvania, CUID No. PA1294 on the grounds that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon the filing of a valid complaint. Our review reveals that the complaint filed against Suburban, while asserting that it challenges CPS rates, challenge only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In a letter dated June 23, 1994, Suburban claimed that the complaint for the Borough of East Greenville should be dismissed on the grounds that the complaint did not pertain to rates for CPS. We have examined the complaint, and we conclude that it challenges only basic rates, not CPS rates, as asserted by Suburban.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form 329 is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding what elements of cable service are included in CPS.

5. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support the challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 14, 1994 against the cable programming service price charged by Suburban Cable TV Co., Inc. in the Borough of East Greenville, Pennsylvania, CUID No. PA1294, IS DISMISSED.

7. IT IS FURTHER ORDERED that the motion to dismiss filed by Suburban Cable TV Co., Inc. IS GRANTED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Media General CUID Nos. VA0020 (Fredericksburg)
Cable of Fredericksburg VA0023 (Stafford)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 30, 1995; Released: June 6, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393s in response on November 15, 1993.

5. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are equal to or lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Form 393, Part III, Schedule C, Operator depreciated its Converter Box 2 units over a useful life of 30.1 years. Operator did not explain why the useful life of its converters substantially exceeds the industry average of approximately 10 years. By depreciating its equipment over an excessively long useful life, an operator understates its annual depreciation costs and could increase its CPS price. Based on our review of various companies' FCC Form 393 benchmark rate filings, depreciation lives of converters generally average 9 to 12 years. We therefore recalculated Operator's annual depreciation expense on Converter Box 2 units (and subsequent steps) based on a useful life of 10 years.[11] This adjustment increases Operator's annual depreciation expense for Converter Box 2 units from $42,099 to $126,574.

b. Because of this error, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra.* Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. §h)76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] *Cf.* United Video Cablevision Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, para. 10b (Cab. Serv. Bur., released Nov. 9, 1994).

currently available for the date as to which Operator filed.[12] On its Form 393s, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index "("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the franchise areas referenced in the caption ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
VA0020	November 22, 1993	November 19, 1993
VA0023	November 3, 1993	October 26, 1993

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
VA0020	$8.62	$6.60
VA0023	$8.62	$6.60

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STARSYS Global Positioning, Inc. File No. 16-DSS-MISC-94

Request for a Declaratory Ruling Concerning Section 310 of the Communications Act

DECLARATORY RULING

Adopted: June 1, 1995; Released: June 1, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we find that Section 310(a) of the Communications Act does not prevent foreign governments or their representatives from holding limited, indirect, noncontrolling interests in Commission licensees. To read Section 310(a) more broadly, we would have to conclude that Congress intended a portion of Section 310(b) to be superfluous. We refuse to adopt such an interpretation.

2. Starsys Global Positioning, Inc. requests a declaratory ruling that it is qualified under Section 310 of the Communications Act to hold a space station license for a Non-Voice Non-Geostationary Mobile-Satellite Service (NVNG MSS or "Little LEO") system.[1] Orbital Communications Corporation ("Orbcomm") filed comments and Starsys replied. On April 20, 1995, Starsys revised its request. Orbcomm then commented, and Starsys replied. For the reasons discussed below, we find that Starsys, if structured as described in the April 20 letter, is qualified under Section 310 to hold a Little LEO license.

II. BACKGROUND

3. Starsys is an applicant to provide NVNG MSS in the frequency bands below 1 GHz.[2] Starsys is a Delaware corporation 5% of which is currently owned by Hughes STX. Starsys's original petition states that the remaining 95% of Starsys is owned by North American CLS, Inc. ("NACLS").[3] NACLS, a Delaware corporation, is wholly owned by Stargos S.A., which is in turn 49.3% owned by Collecte Localisation Satellites ("CLS"). Both Stargos S.A. and CLS are French companies. CLS is 70% owned by organizations that are directly supported by the French government,[4] and 30% owned by French banks. The remaining 50.7% of Stargos S.A. is owned by a number of private companies with no affiliation to any foreign government or representatives thereof.

4. In its April 20 letter, Starsys states that NACLS will reduce its 95% ownership share to no more than 25% by the time of filing of its final financial showing. The April 20 letter does not indicate who will hold the remaining shares of Starsys, but says that no other shares in the ownership chain will be directly or indirectly held by foreign governments or representatives thereof.

5. Starsys's charter and by-laws provide that the 5% stockholder, Hughes STX, has the right to elect three of the five members of the board of directors. The by-laws also specify that the board of directors has exclusive responsibility for the management of the property, affairs, and business of the corporation,[5] and that only one of the directors can have any affiliation with NACLS, its parent or affiliates, or a foreign government. The by-laws further provide that this arrangement cannot be altered without FCC approval. In its April 20 letter, Starsys does not indicate any changes to these arrangements.

III. DISCUSSION

6. Section 310(a) of the Communications Act, 47 U.S.C. § 310(a), states that a "station license required under this Act shall not be granted to or held by any foreign government or representative thereof." Section 310(b), 47 U.S.C. § 310(b), sets benchmarks regarding the level of direct and indirect interest that a foreign company, foreign government, or representative of a foreign government may hold in common carrier, broadcast, or aeronautical stations licensed by the Commission.

7. Starsys has applied for a license to construct, launch, and operate NVNG MSS satellites.[6] Orbcomm argues that Starsys is inviolation of Section 310(a) because the statute prohibits *any* foreign government interest in a licensee. Alternatively, it states that a 25% minority shareholder may be in control. Orbcomm argues that if Starsys does not eliminate French government ownership altogether, the Commission should impose safeguards to ensure that the French government does not control the day-to-day affairs of Starsys. Orbcomm also suggests that Starsys should not remain eligible to be in the first processing round of Little LEO applicants. In reply, Starsys asks for

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[1] *See* 47 C.F.R. § 310; 5 U.S.C. § 544(e); 47 C.F.R. § 1.2.

[2] Starsys is one of three applicants in the first processing group of NVNG applications. The Commission has already granted a license to Orbcomm. Orbital Communications Corporation, 9 F.C.C. Rcd. 6476 (1994).

[3] At present, Hughes STX holds 100% of the 500 Class A common shares, representing a 5% equity interest, and NACLS holds 100% of the 9,500 Class B common shares, representing a 95% equity interest. At every stockholders' meeting, each holder of stock of whatever class is entitled to cast one vote for each share of stock held for any and all purposes except for the election of directors.

[4] Centre National d Etudes Spatiales, the French space agency, owns 55% of CLS, while IFREMER, a French government-supported institute devoted to sea research, owns 15%.

[5] Starsys By-Laws at Article II, Section 1. *See also* Del. Code Ann. tit. 8, Section 141(a).

[6] The Commission has determined that such satellites are non-common carrier in nature. Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice Non-Geostationary Mobile-Satellite Service, 8 F.C.C. Rcd. 8450 (1993). Consequently, Starsys's request does not trigger Section 310(b).

assurance that the ownership changes proposed in the April 20 letter will not constitute a major amendment under Section 25.116 of the Commission's rules.

8. When Section 310 of the Communications Act was enacted in 1934, the provisions contained in current Sections 310(a) and (b) were contained in a single Section 310(a).[7] Significantly, the portion of Section 310(a) that has been renumbered Section 310(b)(3) prohibits certain licenses from being granted to or held by "any corporation... of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or *by a foreign government or representative thereof*...."[8] If, as Orbcomm suggests, Section 310(a) prohibits a foreign government from holding *any* interest in a licensee, this provision limiting such ownership to 20% would be redundant. We will not read a statute so as to make a portion of it superfluous.[9]

9. Indeed, the Commission has held that a government entity must exercise control over the licensee to trigger Section 310(a). The Commission articulated the following standard for determining whether an entity is barred from being a licensee under Section 310(a): "If a foreign government or the representative thereof has either *de facto* or *de jure* control of the licensee, it would be deemed to hold the license," and thus the entity would be precluded from a license grant under Section 310(a).[10] The Commission has defined *de jure* control as "control as a matter of law, such as a 51 percent or greater shareholder of a corporation...."[11] It has determined whether an entity is exercising *de facto* control over an applicant licensee on a case-by-case basis, "governed chiefly by the power to dominate the management of the corporate affairs."[12] The Commission has recognized that even majority shareholders' interests need not be attributable to control if they are adequately insulated from having influence over the management of a station. Specifically, the Commission has held that shareholders with non-voting stock or limited voting rights that do not "confer the power to influence or control a license" do not have attributable interests in the company.[13]

10. This conclusion is also consistent with judicial precedent. In *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), the court concluded that Loyola University, a Jesuit institution, was not prohibited from holding radio licenses under Section 310(a) by virtue of its connection with the Society of Jesus and, in some cases, the Pope. The court concluded that even if Section 310(a) "had a semblance of relevance" to this case, it would be inapplicable since the license was owned by the university and no entity within the Society of Jesus exercised control over the operation of the university's radio station.[14]

11. We find that under the ownership structure described in Starsys's April 20 letter, the French government will not have either *de facto* or *de jure* control of Starsys.[15] With respect to *de jure* control, only 12% of Starsys will be owned by entities that have ties to the French government.[16] Thus, even if the French government were Starsys's largest shareholder, which we cannot determine from the April 20 letter, it would not have *de jure* control.

12. Nor do we find, on the record before us, that foreign government interests will exercise *de facto* control of Starsys. While each situation turns on its particular facts, those presented here do not suggest that foreign government interests will control the day-to-day affairs of Starsys. The by-laws provide the board with exclusive responsibility for managing Starsys's property and business. Under the by-laws, three of the five directors must be elected by Starsys Class A shareholders. In addition, four of the five directors must be unaffiliated with NACLS, or any parent or affiliate thereof, and may not be representatives of a foreign government. Three directors must be U.S. citizens. This portion of the bylaws may not be amended without FCC approval. The April 20 letter does not indicate that these provisions will change in any way. Under these circumstances, we cannot find that the French government is in *de facto* control of Starsys.[17]

13. Finally, Starsys asks us to make a decision under Section 25.116 that the amendment should be granted an exemption from the "cut-off" rules, if major. Starsys provided no specific details regarding the proposed stock transaction or the new potential investors. Under the circumstances, we cannot make a final determination that the amendment is in the public interest. However, although we reserve ultimate judgment as to the qualifications of the new owners, we have previously recognized the need for flexibility in financing new satellite systems. *See,*

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[7] In 1974, the Communications Act was amended to separate Section 310(a) into the current Sections 310(a) and (b).

[8] 47 U.S.C. § 310(b)(3) (emphasis added). *See also* Section 310(b)(4), which contains similar benchmarks.

[9] 2A N. Singer, Statutes and Statutory Construction § 46.06 (Sutherland 4th ed. 1984).

[10] Orion Satellite Corp., 5 F.C.C. Rcd. 4937, 4944 n.26 (1990). *See also* Alpha Lyracom, d/b/a Pan American Satellite, et al., 8 F.C.C. Rcd. 376, 378 n.21 (Comm. Carr. Bur. 1992).

[11] Benjamin L. Dubb, 16 F.C.C. 274, 289 (1951).

[12] Id.

[13] Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 F.C.C. 2d 997, 1021 (1984) (power to compel dividends or financial distribution non-attributable). *See also* Cleveland Television Corp., 91 F.C.C. 2d 1129, 1161 (Rev. Bd. 1982), *review denied*, FCC 83-235 (released May 18, 1983), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984) (stock considered to be non-voting for attribution purposes where voting rights in "certain narrow areas" were required under state law and did not involve "matters which would have an impact on the operation of the proposed station.")

[14] 260 F.2d at 741.

[15] Because we conclude that the foreign government interests involved here do not control Starsys, we need not decide whether any of the foreign government interests are in fact representatives of foreign governments.

[16] This percentage is derived by employing a "multiplier" approach to calculate the attributable ownership in Starsys of the foreign government interests. Organizations directly supported by the French government hold a 70% interest in a 49% owner of 25% of Starsys's equity. Interests in excess of 50% are not reduced by a multiplier. Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C. 2d 997 (1984), *recon.*, FCC 85-252 (released June 24, 1985) 58 R.R.2d 604, *further recon.*, 1 F.C.C. Rcd. 802 (1986).

[17] Because we have not found evidence of *de facto* foreign government control on this record, we need not address Orbcomm's request that we impose structural safeguards on Starsys. Of course, if Starsys's ownership structure changes or if new facts come to light prior to licensing of Starsys's system, they will be fully considered at that time.

e.g., Satellite CD Radio, Inc., 9 F.C.C. Rcd. 2569 (Comm. Carr. Bur. 1994). In *Constellation Communications, Inc.*, DA 95-126 (Jan. 31, 1995), *recon. pending*, we were faced with a similar question, and we stated with respect to LEO systems in the 1.6/2.4 GHz frequency bands ("Big LEOs") that our overriding concern is whether the applicant has attempted to profit from the sale of an application. Unless there is evidence of this, we do not prevent applicants from procuring partners to help finance the costs of their systems. We expect Starsys to seek a fact-specific ruling concerning our cut-off rules prior to consummating transactions that would have the cumulative effect of changing ownership or control of more than 50% of Starsys's stock, but the facts now before us would be consistent with a finding that the proposed ownership changes are in the public interest.

IV. CONCLUSION

14. As structured in the April 20 letter, we find no evidence that the French government will be in *de facto* or *de jure* control of Starsys. Accordingly, we find that Section 310(a) will not preclude grant of a satellite license to Starsys, so long as the company continues to shield its foreign government investors from the business and policy decisions of the licensee.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and Section 0.261 of the Commission's Rules on delegations of authority, 47 C.F.R. § 0.261, that the request of Starsys Global Positioning, Inc. for a declaratory ruling IS GRANTED as described herein, and that Starsys Global Positioning, Inc., if restructured as described in the April 20 letter, is qualified under Section 310(a) of the Communications Act to hold a non-voice non-geostationary mobile-satellite service system license.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sonic Cable Television of San Luis Obispo	CUID Nos. CA0032, CA0034, CA0037, CA0038, CA0040

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 1995; Released: April 7, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price Sonic Cable Television of San Luis Obispo ("Operator") was charging for its cable programming service ("CPS") tier in Grover Beach, California, CUID No. CA0032; Morro Bay, California, CUID No. CA0034; Paso Robles, California, CUID No. CA0037; Pismo Beach, California, CUID No. CA0038; and San Luis Obispo, California, CUID No. CA0040, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, Operator has informed the Commission that as of September 1, 1993, it only offered one tier of service in the communities referenced above. The channel line-ups and rate cards that Operator submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and Operator's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If any complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his or her challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by Operator in Grover Beach, California, CUID No. CA0032; Morro Bay, California, CUID No. CA0034; Paso Robles, California, CUID No. CA0037; Pismo Beach, California, CUID No. CA0038; and San Luis Obispo, California, CUID No. CA0040, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-210

In re Application of

LOMPOC MINORITY BROADCASTERS PARTNERSHIP — File No. BPH-900518MO

For Construction Permit for a
New FM Station on Channel 285A,
Lompoc, California

SUPPLEMENTAL DECISION

Adopted: August 17, 1995 **Released: September 1, 1995**

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. This matter is before the Review Board on a remand from the Commission for such further proceedings as may be necessary to resolve basic qualifying issues that had been designated against Lompoc Minority Broadcasters Partnership (LMBP). The Board is granting the LMBP application for a new FM broadcast station.

2. In *Initial Decision*, 8 FCC Rcd 916 (1993) (*ID*), Administrative Law Judge Joseph P. Gonzalez found LMBP to be unqualified on a site certification misrepresentation issue and granted the competing application of Lion's Share Broadcasting. The Review Board affirmed the grant to Lion's Share on comparative grounds only, without acting on exceptions going to LMBP's basic qualifications. *Lion's Share Broadcasting*, 8 FCC Rcd 8423 (1993) (*Decision)*. On review, the Commission found that the Lion's Share application should never have been designated for hearing, because it was unacceptable for filing under the Commission's "hard look" processing guidelines. *Lion's Share Broadcasting*, 10 FCC Rcd 3262, 3263-65 (1995). The Commission dismissed the Lion's Share application and remanded the LMBP application to the Board.

3. The qualifying issues designated against LMBP were:

> (1) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance that its proposed transmitter site was available;
>
> (2) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance of the availability of funds that it estimated that it would need to construct and operate its proposed station;
>
> (3) To determine in light of the evidence adduced under the foregoing issues whether LMBP is basically qualified to be a Commission licensee.

ID, 8 FCC Rcd at 916 ¶ 3, *repeated in Lion's Share Broadcasting*, 10 FCC Rcd at 3265 ¶ 26. After trying these issues, the ALJ found that LMBP's site certification when it filed its application was a material misrepresentation to the Commission requiring LMBP's disqualification. *ID*, 8 FCC Rcd at 918 ¶ 15. The ALJ further found that LMBP had reasonable assurance of financing when it so certified and, therefore, resolved the false financial certification issue in LMBP's favor. *Id.* ¶ 17. LMBP excepted to the finding of misrepresentation about its site certification; Lion's Share excepted to the finding that LMBP was financially qualified.

4. *Site Certification.* Before certifying to reasonable assurance of a transmitter site, LMBP principal Richard Keating approached a Mr. Vance, whom he had identified as the owner of the chosen tower site along with Mrs. Vance. According to Keating, Vance said he owned the site, that Keating could use it for LMBP's tower, but that the details of any lease would have to be negotiated with Vance's attorney, Terrill F. Cox, because Vance was in poor health and did not want to deal with the details of a lease agreement. Keating was unable to reach Cox until after LMBP had filed its application containing the certification and, at the meeting with Cox, was told that the land was owned by Stanley Hollister and William Sudden, not Mr. Vance. Keating then contacted Hollister and, four days after LMBP's application had been filed, Hollister and Sudden signed a letter purportedly making the site available to LMBP. LMBP Exh. 14, 14D, 14E, 14G, 16, 17; *ID*, 10 FCC Rcd at 917 ¶ 14.

5. The *Initial Decision* found that LMBP lacked reasonable assurance of the site at the time of certification because Vance, although willing to consider leasing the land, did not want to discuss the details and, in fact, did not own the land. Thus, the *ID* found that the meeting of the minds requisite to a reasonable assurance of a site had not occurred and, indeed, there was not even a possibility that the site would be available when LMBP certified to its cite. Accordingly, the *ID* concluded that the representation of reasonable assurance given in the application was a material misrepresentation requiring LMBP's disqualification. *ID* at 917-18 ¶ 15.

6. In exceptions, LMBP argued that the finding of material misrepresentation is contrary to the record. According to LMBP, nothing in the record suggests that either Vance or Keating realized the property was owned by someone else until two days after LMBP had filed its application, and a representation to the Commission based on Vance's erroneous statement -- before the error was known -- does not make LMBP's certification a misrepresentation. Further, LMBP argued, permission to use the site subject to later agreement about the terms is sufficient for a broadcast applicant to conclude that it has reasonable assurance. LMBP Brief (Mar. 25, 1993 copy) at 18-19. Lion's Share disagreed, arguing that LMBP had determined no more than that a possibility of a lease existed at the time of certification, and that the ALJ had no choice but to disqualify LMBP for misrepresenting it had reasonable assurance of a site. Lion's Share Reply Brief at 5-6.

7. To be disqualifying as a misrepresentation or lack of candor, an erroneous statement must be more than inaccurate or incomplete. The *sine qua non* of wilful misrepresentation or lack of candor is fraudulent or deceitful intent. *See Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986); *Fox*

River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983), *recon. dismissed*, FCC 83I-43 (released Apr. 20, 1983). The *Initial Decision* contains no finding of any intent to deceive, and we do not find fraudulent intent from the record before us. Keating relied on county property assessment records, which identified the Vances as the owners, and he relied on Vance, who claimed ownership of the land. LMBP Exh. 14, 14C. Keating had no reason to doubt that Vance was the owner until he spoke with Vance's attorney – two days *after* the certification. Although Keating did not discuss the details of a lease with Vance, this lack of detailed discussion by itself does not establish any intent to deceive the Commission. Nothing in the record suggests that Keating had reason to doubt either Vance's sincerity or the likelihood of a successful conclusion to negotiation with Vance's attorney, and nothing in the record suggests that Keating thought his efforts were inadequate to establish reasonable assurance at the time he certified to this assurance. Thus, the designated site misrepresentation/lack of candor issue should have been resolved in LMBP's favor on this record, regardless of whether Mr. Vance was able to provide LMBP with reasonable assurance.

8. In a footnote to its *Decision*, the Board opined that, if comparative considerations were not controlling, a remand would be necessary to determine whether LMBP had reasonable assurance from Hollister and, if not, whether LMBP had made material misrepresentations or was lacking in candor regarding this matter. 8 FCC Rcd at 8424 n.5. The Board's concern was based on Hollister's testimony at tr. 143-44, 147, which reflected considerable ambivalence about leasing his property. Hollister had stated his willingness to negotiate with LMBP, then said on cross examination that he really had no intention to lease the property, and then softened his statement on redirect by saying that he had been and was still willing to negotiate a lease, although he did not know how the negotiations would be resolved. Tr. 144, 147, 148. The ALJ had noted Hollister's equivocation but did not address it in light of his disposition of the designated issue, *ID*, 8 FCC Rcd at 918 ¶ 15, and the Board was concerned that this equivocation reflected adversely on LMBP's continued reasonable assurance of the property's availability as a transmitter site. Subsequent to the Board's *Decision*, on January 6, 1994, LMBP amended its application with a "Lease Option" agreement executed by Hollister and Sudden, the other owner of the land, and by Keating on January 5, 1994. *See Lion's Share Broadcasting*, 10 FCC Rcd at 3265. This agreement clarifies Hollister's and Sudden's willingness to make their land available to LMBP and, in the Board's view, obviates the concern about LMBP's access to its site.[1] *See generally National Innovative Programming Network, Inc. of the East Coast*, 2 FCC Rcd 5641 (1987). In light of this, the Board sees no need for designation of further site related issues against LMBP.

9. *Financial Misrepresentation Issue.* When certifying to its financial qualifications, LMBP relied on his conversation with Steven M. Curl, then Senior Vice President of MBank ElPaso, N.A., El Paso, Texas, and a letter from the bank prepared at Curl's behest. Keating testified to a good working relationship with Curl based on his success in making profitable two radio stations purchased with an MBank loan and also on two loans he had secured from the bank. Curl testified in writing that he was familiar with Keating and his business qualifications and had an established business relationship with Keating, having watched as Keating made the two stations profitable, and that he had reviewed Keating's plan for the proposed station, the amount of the financing needed, the proposed loan structure, and how the loan would be repaid. *ID*, 8 FCC Rcd at 918 ¶ 16; LMBP Exh. 13, 13A, 13B, 13C, 18. From this, the *Initial Decision* concluded that LMBP had reasonable assurance of the availability of the funds necessary to be financially qualified at the time it certified to its financial qualifications and that, therefore, the false financial certification issue should be resolved in LMBC's favor. *Id* at 918 ¶ 17.

10. Before an adverse conclusion can be drawn under a financial misrepresentation issue, there must be a finding that the applicant intended to deceive the Commission with an unfounded certification of reasonable assurance of financing. *See Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, 7998 ¶ 12 (1992); *see generally Leflore Broadcasting, supra; Fox River Broadcasting, supra; Character Policy Statement, supra.* In its exceptions to the *Initial Decision*, Lion's Share has not argued that deceptive intent was shown anywhere on the record. Its complaints are that it was unable to cross examine Curl in order to test his sworn statement and that Keating might not have provided sufficient information for the bank's purposes. Lion's Share Brief at 5-9. In reply, LMBP correctly cited the *Report and Order* in *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 162 ¶ 36 (1990), in which the Commission limited oral testimony to material issues of decisional fact that cannot be adequately resolved without it. LMBP Reply Brief at 2-3. In light of this standard and the burden placed on parties desiring to cross examine witnesses on their written testimony to make a specific showing supporting that request, *Proposals to Reform* at 162 ¶ 35, we cannot say that the ALJ abused his discretion by failing to strike the Curl statement when Curl became unavailable for cross examination. As LMBP pointed out, Keating was available for cross examination on this issue but was not questioned, although he was cross examined on the site misrepresentation issue. LMBP Reply at 2 n.1. Also, as LMBP argued, nothing in the record contradicted its showing. *Id.* at 7. Absent any argument about LMBP's intent,[2] the *Initial Decision* should not be reversed for the purpose of fishing for flaws in LMBP's underlying financial proposal.

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[1] Subsequent to LMBP's unopposed amendment, Lion's Share asked the Commission to remand the case to the Review Board only to decide the issues of LMBP's basic qualifications as specified by the ALJ and ruled on in the *Initial Decision* but did not ask for enlargement of the issues to consider the impact of Hollister's earlier equivocation on LMBP's basic qualifications. *See* Lion's Share, Request for Remand, filed Mar. 10, 1994.

[2] When designating the financial certification issue at Lion's Share's request, the ALJ assigned the burden of going forward with the evidence to Lion's Share. *Memorandum Opinion and Order*, FCC 92M-552, p. 2, released May 12, 1992.

11. ACCORDINGLY, IT IS ORDERED That the application of Lompoc Minority Broadcasters Partnership (File No. BPH-900518MO) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WMAX, Inc. File No. BR-890522UR

For Renewal of License of
Station WMAX (AM)
Kentwood, Michigan

MEMORANDUM OPINION AND ORDER AND FORFEITURE ORDER

Adopted: July 31, 1995; Released: September 1, 1995

By the Commission:

1. The Commission has under consideration: (1) its Memorandum Opinion and Order and Notice of Apparent Liability, *Lanser Broadcasting Corporation*, 7 FCC Rcd 4254 (1992) (*"Lanser"*) concerning the license renewal application of Station WMAX(AM),[1] Kentwood,[2] Michigan; (2) a petition for reconsideration of that decision filed by the Michigan State Conference of Branches of the NAACP ("NAACP"); and (3) a request dated July 28, 1992, from WMAX, Inc., the former licensee of Station WMAX(AM), to rescind the forfeiture. For the reasons that follow, we deny the NAACP's petition for reconsideration with respect to WMAX(AM),[3] and we deny the request of WMAX, Inc. to reduce the forfeiture.

The NAACP's Petition for Reconsideration

2. In *Lanser*, we found no evidence that WMAX, Inc. had engaged in discrimination. In this regard, we observed that the station had hired minorities during the license term. However, we also found serious deficiencies in the station's EEO program. WMAX, Inc. did not recruit for vacancies when they occurred, but relied solely on unsolicited applications to fill its hiring needs. Also, it had not maintained any records of referrals, applicants or interviewees and thus was unable to adequately self-assess its EEO program as required by our rules. Accordingly, we granted the renewal application, subject to reporting conditions, and we issued a notice of apparent liability for forfeiture for $7,500. *Lanser*, 7 FCC Rcd at 4256-57, 4259.

3. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted with respect to our disposition of the license renewal application of WMAX(AM).

4. In seeking reconsideration, the NAACP does not dispute any specific factual finding concerning Station WMAX(AM). Rather, the NAACP argues that the Commission erred in granting renewal and submits that the application should have been designated for hearing.[4] According to the NAACP, the Commission's decision was based on its improper acceptance of the station's argument that its failure to hire more minorities was due to the station's low pay scale and uncertain job security. We disagree. The Commission did not accept this allegation. The NAACP has not submitted any evidence that suggests that our assessment of the licensee's record contains a material error or omission or that the licensee's assertions regarding its record of minority hiring raised a substantial and material question of fact concerning discrimination. As we have consistently stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. *See, e.g., Isis Broadcast Group*, 8 FCC Rcd 24 (Rev. Bd. 1992), *citing WWIZ*.

WMAX, Inc.'s Request for Rescission

5. The forfeiture was assessed for WMAX, Inc.'s apparent repeated violation of 47 C.F.R. § 73.2080 which requires, *inter alia*, that licensees establish and maintain a program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. WMAX, Inc. does not dispute that it violated our EEO rule. Rather, WMAX, Inc. submits that rescission is warranted because it is unable to pay the forfeiture.

6. Section 503(b)(2)(D) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2)(D), prescribes that the Commission shall take into account ability to pay in determining the amount of a forfeiture. *See also*, Section 1.80(b)(4) of the Commission's Rules. Section 1.80(f)(3) of the Commission's Rules provides that "[a]ny showing as to why the forfeiture should not be imposed ... shall include a detailed factual statement and such documentation and affidavits as may be pertinent." The attachment to the Notice of Apparent Liability informs the licensee that, if it claims a financial inability to pay, it should furnish, *inter alia*, a profit and loss statement prepared under generally accepted accounting principles. No data in the statement should be more than one year old. The profit and loss

[1] On April 7, 1992, the Commission granted the application to assign the license of Station WMAX(AM) from WMAX, Inc. to Grand Valley State University (File No. BAL-911125EB). On July 20, 1992, the call sign of the station was changed from WMAX(AM) to WGVU(AM). For administrative convenience, we refer to the station in this order by its former call sign.

[2] The NAACP's pleadings and our prior order mistakenly refer to the community of license for WMAX(AM) as Grand Rapids.

[3] Both the decision and the petition for reconsideration also concern license renewal applications other than the one filed by WMAX, Inc. In this order, we address the petition only insofar as it relates to WMAX(AM).

[4] The NAACP also faults the decision for not using the figures and methodology appearing in *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*"Standards"*) in determining the amount of the forfeiture for WMAX, Inc. Because we no longer use *Standards* in assessing forfeitures [*see, e.g., KSBW License, Inc.*, 9 FCC Rcd 6701, 6703 (1994)], the NAACP's argument is moot.

statement should include income from broadcast operations, expenses, and payments to principals. *See Group Six Communications, Inc.*, 8 FCC Rcd 3111 (1993).

7. In its request, WMAX, Inc. states that it has no assets and that current liabilities "exceed the ability of the company to pay any monetary fine in this matter." Specifically, WMAX, Inc. claims that its "[c]urrent accounts payable exceed $18,000 with no appreciable assets." WMAX, Inc. also claims that the company has had net losses of $527,699 since the station was purchased in 1982. However, none of these claims was verified. Moreover, WMAX, Inc. proffered no information about the proceeds realized from the sale of the station to Grand Valley State University (see note 1, *supra*).[5] In short, the information submitted by WMAX, Inc. is insufficient to establish that it is unable to pay the forfeiture.

8. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by the NAACP with respect to WMAX(AM) IS DENIED.

9. IT IS FURTHER ORDERED that WMAX, Inc., former licensee of Station WMAX(AM) is HEREBY ORDERED TO FORFEIT to the United States the sum of seven thousand five hundred dollars ($7,500) for repeated violations of Section 73.2080 of the Commission's Rules. Payment may be made in accordance with the instructions previously provided.

10. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this Memorandum Opinion and Order and Forfeiture Order to the NAACP and to WMAX, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] WMAX, Inc. also submits with its request unsigned copies of its federal income tax returns for the years 1990 and 1991. Although both returns show that the corporation experienced losses -- $47,647 in 1990 and $91,317 in 1991 -- there is no information as to what payments, if any, were made to principals.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Metro Media Broadcasting, Inc.
Licensee of Station WQPW(FM),
Valdosta, Georgia

File No. BRH-881201ZJ

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1995; Released: September 1, 1995

By the Commission:

1. The Commission has under consideration: (1) a $15,000 forfeiture order, *Metro Media Broadcasting, Inc.*, 8 FCC Rcd 323 (1993) (*"Forfeiture Order"*) issued to Metro Media Broadcasting, Inc. ("Metro Media"); and (2) Metro Media's petition for reconsideration of the *Forfeiture Order*. For the reasons that follow, we deny the petition.

2. The forfeiture was assessed for violation of 47 C.F.R. § 73.2080 which requires, *inter alia*, that licensees establish and maintain a program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. More particularly, we found that Metro Media "often failed to notify recruitment sources of specific job openings and failed to meaningfully self-assess its EEO program." *See Forfeiture Order* at ¶ 2. *See also, Certain Broadcast Stations - Alabama and Georgia*, 6 FCC Rcd 5968, 5972-73 (1991) (*"Notice of Apparent Liability"*). Metro Media made several arguments in support of reduction or rescission of the forfeiture.

3. First, Metro Media argues that a forfeiture was inappropriate because the *Notice of Apparent Liability* concluded that there was no evidence of discrimination. Although Metro Media apparently recognizes that we had found deficient its efforts to employ Blacks on a full-time basis,[1] it suggests that its part-time employment of Blacks, coupled with the absence of discrimination, warrant rescission of the forfeiture. Metro Media concludes that a forfeiture would reduce employment opportunities at the station for everyone.

4. Second, Metro Media submits we did not properly consider its financial information. That information demonstrated that, although the station had a net profit in excess of $48,000 for the first ten months of 1989, net losses were in excess of $15,000 and $97,000, respectively, for the first ten months of 1990 and 1991. Metro Media contends that the 1991 loss resulted from a drop in sales and that it caused the station to reduce the number of full-time employees by 30 percent. Metro Media attributes its losses to the general recession and the downsizing of the military, which included the threatened closure of nearby Moody Air Force Base. Metro Media concludes that its ability to pay a forfeiture has been adversely affected by its "significant losses."

5. Metro Media also argues that we misread its financial documents. Specifically, Metro Media claims we placed too much emphasis on its accountant's disclaimer that certain disclosures about Metro Media's financial condition had been omitted. That disclaimer noted that statements of cash flows and retained earnings required by generally accepted accounting principles were not included. Metro Media submits that neither its cash flow nor its retained earnings statement has any applicability to the question of mitigation or rescission of the forfeiture. Citing *Channel 33, Inc.*, 7 FCC Rcd 7917 (MMB 1992), Metro Media argues that the Commission has not required other licensees to submit an analysis of cash flow or a statement of retained earnings.

6. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted.

7. We reject Metro Media's first argument that a forfeiture was inappropriate because the *Notice of Apparent Liability* and *Forfeiture Order* concluded that there was no evidence of discrimination. The forfeiture was based on Metro Media's repeated failure to comply with Section 73.2080(c)(2) and (c)(5) of the Commission's Rules. Those provisions require licensees to use potential sources of minority and female applicants to supply referrals whenever job vacancies occur and to analyze the results of their efforts to recruit minorities and women. Plainly, Metro Media failed to comply with these rules.[2] *See Notice of Apparent Liability*, 6 FCC Rcd at 5972 ¶ 31; *Forfeiture Order*, 8 FCC Rcd 323 at ¶ 2.

8. We also disagree with Metro Media's contention that we misread its financial documents. Although those documents showed that the station had experienced pre-tax losses in 1990 and 1991 and that 1991's losses were substantially greater than those of 1990, the documents did not establish that the station was unable to pay the forfeiture. Indeed, the approximately $15,000 loss for 1990 included depreciation in the amount of $63,349.03, and the loss for 1991 included depreciation in the amount of $50,330.10. In addition, although the station's listed current assets ($114,390.44) were less than one half of the current liabilities ($280,237.54), the station's current assets did not include a loan receivable from an officer in the amount of $201,393.54. Given the foregoing, we cannot conclude that Metro Media's ability to pay the forfeiture is seriously in question.

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[1] Metro Media also asserts that the Commission did not find that it violated any Commission rule. However, Metro Media is mistaken. *See Forfeiture Order*, 8 FCC Rcd 323 at ¶ ¶ 1, 2 and 7, where the Commission stated that Metro Media violated Section 73.2080 of the Commission's Rules.

[2] In this regard, whatever merit there may have been to Metro Media's employment of Blacks on a part-time basis, such employment apparently did not lead to their being offered, or considered for, full-time employment. Moreover, our primary focus is on efforts to hire full-time employees when analyzing EEO programs. *See License Renewal Applications*, 7 FCC Rcd 6045, 6046 (1992).

9. Moreover, as noted in the *Forfeiture Order*, Metro Media's financial submission included a letter from its accountant which observed that:

> "Management has elected to omit substantially all of the disclosures and the statements of cash flows and retained earnings required by generally accepted accounting principles. If the omitted disclosures and statements of cash flows and retained earnings were included in the financial statements, they might influence the user's conclusions about the Company's financial position ...."

The information reviewed by Metro Media's accountant did not include material required by generally accepted accounting principles. Thus, a fair reading of the accountant's statement is that significant information concerning Metro Media's financial situation was omitted. There is simply no way to know what impact inclusion of this information would have had on the question of Metro Media's ability to pay. Having failed to provide information its own accountant deemed significant, Metro Media must bear responsibility for its absence. Given the accountant's statement and considering the financial information Metro Media did choose to submit, we reaffirm our conclusion that Metro Media's financial documents were "not sufficient to prove that it is unable to pay the forfeiture."[3] *Forfeiture Order*, 8 FCC Rcd 323 at ¶ 5.

10. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Metro Media on February 10, 1993, IS DENIED. Metro Media, licensee of Radio Station WQPW(FM), Valdosta, Georgia, is HEREBY ORDERED TO FORFEIT to the United States the sum of fifteen thousand dollars ($15,000) for repeated violations of Section 73.2080 of the Commission's Rules. Payment may be made in accordance with the instructions previously provided.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Contrary to Metro Media's assertions, nothing in the Bureau's decision in *Channel 33, Inc.* undermines our conclusion in this case. In *Channel 33, Inc.*, the Bureau reduced a proposed forfeiture from $12,500 to $10,000 because of the licensee's overall record of compliance with our rules. However, the Bureau declined to reduce the proposed forfeiture because the licensee did not submit a profit and loss statement prepared under *generally accepted accounting principles*. Here, we are unable to reduce or rescind Metro Media's forfeiture because its profit and loss statement omits information required by generally accepted accounting principles.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY NEW MEXICO
CABLE CORPORATION

Appeal of Local
Rate Order of the Town of
Silver City, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1995; Released: May 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 23, 1995, Century New Mexico Cable Corporation ("Century"), the franchisee in the above matter, filed an appeal of a rate order adopted on December 19, 1994 by its local franchising authority, the Town of Silver City, New Mexico (the "Town"). The Town filed an opposition, urging the Commission to deny Century's appeal, to which Century filed a reply. In its rate order, the Town established rates for basic tier service and associated equipment and installations and required Century to refund overcharges to subscribers.[1]

2. Century challenges the Town's rate order with respect to two issues.[2] First, Century contends that the Town arbitrarily and unreasonably increased Century's equipment basket figure by including in it 100 percent of the wages attributable to certain employees, who Century claims spend only a portion of their time performing duties related to regulated installations or the maintenance of customer equipment. Second, Century asserts that the Town inappropriately recalculated its rate for converters in Step D of Part III of Form 393 (and the parallel portion of Form 1200) to reflect an estimated converter failure rate of eight percent of the units in service, rejecting Century's own figure of five percent.

3. In response, the Town claims that Century did not cooperate with its requests for more information throughout the review process, impeding its ability to make a fully informed decision. Before issuing its rate order, the Town states that it requested that Century explain and justify certain figures relating to its equipment basket, including those figures challenged in this appeal. The Town contends that Century never provided sufficient justification for its equipment-related figures. As a result, the Town conducted its own independent analysis, which resulted in it making changes to Century's rate filing and requiring adjustments to particular rates. Therefore, the Town asserts that it made its decision based on the best information available. In its opposition, the Town also asks the Commission for authority to impose sanctions, including fines and forfeitures, against Century for its refusal to respond to the Town's information requests and orders and for Century's alleged misrepresentations and material omissions made during the review process.

4. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

II. DISCUSSION

5. Franchising authorities are given a certain amount of discretion in conducting their regulatory review.[7] Cable operators have the burden of establishing the reasonableness of their rates that are subject to regulation.[8] If a franchising authority determines that an operator has not met that burden, it may set an operator's rates based on the best information available.[9] In reviewing a rate filing, a franchising authority may require an operator to provide a reasonable explanation for the figures contained in its rate filing and may also ask for supporting documentation to substantiate the figures.[10] Operators are required to respond to reasonable requests from franchising authorities in a timely fashion.[11] If a franchising authority does not receive a satisfactory response or receives no response at all, it may rely on the best information available.[12] We must affirm the Town's decision if we find it was reasonable. To determine if the Town's decision was reasonable, we must analyze the decision in its proper context. In making the two changes to Century's rate filing that are challenged in this

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] The Town's rate order rules on both Century's Form 393 rate filing and its Form 1200 and 1205 rate filing. The issues appealed by Century apply to the rate order's applicability to both rate filings.

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] *Third Recon. Order*, 9 FCC Rcd at 4346.

[8] 47 C.F.R. § 76.937(a).

[9] *See* 47 C.F.R. 76.937(d).

[10] *See* 47 C.F.R. § 76.933(b).

[11] *See Third Recon. Order*, 9 FCC Rcd at 4348.

[12] *See* 47 C.F.R. 76.937(d).

appeal, the Town determined that Century had not provided an adequate explanation or an appropriate justification for its own equipment-related figures.

6. The 1992 Cable Act requires that the rates for regulated installation services and leased equipment be set "based on actual cost."[13] In Part III of Form 393 and in Form 1205, under the revised rules, an operator must calculate its permitted rates pertaining to regulated equipment and installations from an aggregate "equipment basket" figure. As part of its equipment calculations, an operator must derive an hourly service charge ("HSC") that is "computed by taking the sum of all equipment basket costs except purchase cost of all equipment, and dividing that sum by the operator's total annual person hours dedicated to leasing, installing and equipment repair service."[14] To calculate the HSC, an operator should aggregate all of its direct costs related to the maintenance and installation of regulated service and equipment.[15] These costs should consist of both capital costs (i.e., costs incurred over the lifetime of capital equipment) and yearly operating costs (i.e., costs that vary year to year). An operator's yearly operating costs should include the salaries and wages of personnel who contribute to regulated installations and to the maintenance of customer equipment.

7. During the review period, the Town determined that Century had undercalculated its equipment basket and, as a result, requested that Century provide it with explanations and justifications for certain figures related to its equipment basket.[16] The Town contends that Century did not provide a sufficient response to these requests. The Town then recalculated Century's equipment basket. Specifically, the Town conducted its own analysis of Century's equipment basket, discovered discrepancies and inconsistencies in certain components of the equipment basket, and determined that some of Century's figures on its rate filing were not justifiable, including its allocation of labor hours and salaries, converter repair costs, and customer equipment percentages. In an effort to correct these discrepancies and inconsistencies and to ensure that the HSC was calculated properly, the Town, *inter alia,* adjusted the equipment basket by increasing the portion dedicated to the salaries of all four employees who had been designated by Century as "operating personnel." Century claims that these particular employees spent only a portion of their time on regulated activities and therefore, under the Commission's rules, only a corresponding fraction of their salaries should have been included in the total equipment basket figure. More generally, Century contends that the Town should have relied on Century's own equipment basket figure as a reasonable, good faith estimate.

8. Because the Town did not receive satisfactory explanations or justifications from Century regarding its equipment basket figure, the Town made changes to Century's rate filing to reflect what it believed to be more representative data, including data on the salary adjustment. We find this adjustment to be reasonable. Century was given numerous opportunities by the Town to provide explanations and justifications to support its own data.[17] Although Century does contend in its reply that it was responsive to the Town's requests for further information, we will defer to the Town's judgment that Century's responses were insufficient, especially since Century provides no substantive support for the adequacy of its responses. As a result, our rules provide that the Town was entitled to base its decision on the best information available.[18] The Town made a reasonable effort to replace Century's data with data that was both accurate and substantiated and, in fact, as part of this effort, it interviewed a former Century employee to confirm if Century had accurately allocated the number of hours spent by operating personnel on regulated activities. Century has not presented sufficient evidence to allow us to find the Town's decision to be unreasonable.[19] Therefore, we deny Century's appeal with respect to this issue and affirm the Town's decision.

9. Century also challenges the Town's decision to adjust the figures that it used to derive a monthly leasing rate for converters.[20] Specifically, in deriving this particular rate, Century had estimated a failure rate of five percent of the units in service. The Town questioned the basis for this estimate andhthen substituted a failure rate of eight percent of the units in service. Again, Century claims that the Town should not have made this adjustment to its data because it was based on a good faith estimate. In response, the Town contends that Century was given multiple opportunities to explain and justify this data. Because it did not do so, the Town made changes to Century's rate filing based on its own analysis.

10. In its appeal, Century provides no explanation or justification for its estimated converter failure rate of five percent. It only states that it is based on a good faith estimate. On November 8, 1994, the Town, in written correspondence to Century, questioned the reasonableness of this figure. It received no response from Century. From an on-site inspection of Century's Silver City facility on

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[13] Communications Act of 1934 § 623(b)(3), 47 U.S.C. § 543(b)(3).

[14] *Rate Order,* 8 FCC Rcd at 5816.

[15] *See Rate Order,* 8 FCC Rcd at 5815-16.

[16] For example, in written correspondence dated November 8, 1994 and December 15, 1994, the Town requested more information from Century regarding its equipment basket allocations.

[17] In the exhibits provided with its opposition, the Town has documented that it requested further information from Century by written correspondence dated September 30, 1994, November 2, 1994, November 8, 1994, and December 15, 1994 before it adopted its rate order.

[18] *See* 47 C.F.R. 76.937(d).

[19] In its reply, Century does note that in an affidavit prepared for the Town by a former Century employee and relied upon by the Town to support its decision to adjust the regulated labor portion of the equipment basket, the employee does not indicate that the four employees spent 100 percent of their time on installation and maintenance activities. As a result, Century claims that even if this affidavit could arguably constitute the "best information available," it does not support Century's decision to allocate 100 percent of these employees' salaries to the equipment basket. We do not agree with Century. First, the affidavit only indicates the portion of time the employees spent on installation activities, rather than all regulated activities. Also, the affidavit does show that the employees spent a significant portion of their time on installation activities. Moreover, the Town has not stated nor implied that it relied exclusively on this particular affidavit as the only basis to adjust the regulated labor portion of Century's equipment basket.

[20] Under both Form 393 and Form 1205, in deriving the rate for leased equipment, an operator must include in the calculations both the capital costs and the maintenance costs associated with each particular piece of equipment.

November 4, 1994, the Town determined that 130 converters were awaiting repair at that particular time and, from a conversation with the technician present at the facility, it further determined that the average failure rate was approximately 120 converters per quarter for the entire system. Based on an extrapolation of this data, the Town derived a revised converter failure rate of eight percent. The Town was reasonable in seeking a justification for Century's converter data. Moreover, the Town is able to provide a reasonable basis for its revised figure whereas Century only counters that its original figure was based on a good faith estimate. Century has the burden of justifying its rates. Century did not meet this burden, and, therefore, we affirm the Town's decision with respect to this issue.

11. Finally, we address the Town's request that Century be assessed fines under a local ordinance and forfeitures pursuant to Section 503(b) of the Communications Act for its "failure to respond to the franchising authority's requests for information, orders, and decisions and its misrepresentations and willful material omissions." Our rules provide that a forfeiture may be assessed against any person who has willfully or repeatedly failed to comply substantially with an order or regulation issued by the Commission or with any provision of the Communications Act.[21] The Town fails to provide substantiation for these allegations. The fact that Century relied on estimates for certain equipment basket figures does not constitute a willful and repeated failure to comply with our rules or the Communications Act. We find insufficient evidence to suggest that Century engaged in such a willful or repeated failure to comply. Therefore, we believe that imposition of forfeitures against Century would be inappropriate.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that Century New Mexico Cable Corporation's appeal of the Town of Silver City, New Mexico's local rate order, regarding the Town's inclusion of 100 percent of four employees' salaries into the regulated equipment basket is DENIED.

13. IT IS FURTHER ORDERED that Century New Mexico Cable Corporation's appeal of the Town of Silver City, New Mexico's local rate order, regarding the Town's adjustment to Century's converter failure rate is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[21] 47 C.F.R. § 1.80(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LAKE CABLEVISION, INC.
Petition for Reconsideration

of the Certification of
County of Hall, Georgia
to Regulate Basic Cable Rates
(GA0598)

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1995; Released: May 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 31, 1995, Lake Cablevision, Inc. ("Cablevision") filed a timely petition for reconsideration challenging the certification of Hall County, Georgia (the "County") to regulate rates for basic cable service and associated equipment.[1] On April 27, 1995, the County filed a motion to accept late filing of opposition and an opposition to Cablevision's petition.[2] Cablevision filed a reply to the County's motion and opposition on May 5, 1995.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Cablevision argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Hall County, its franchise area.[8] Cablevision claims that it currently serves a total of 1,899 of the 26,109 households (that is, occupied housing units)[9] in its franchise area, or 7.3% percent of the total number of households in its franchise area. As supporting documentation, Cablevision

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[1] The County ostensibly filed a Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on or about September 27, 1993. However, in a prior proceeding we noted that the Commission did not have a record, and the County could not provide proof (through a return receipt or date stamped copy), of the County's filing. We therefore, found that the County was not certified to regulate basic cable service rates. *See* Lake Cablevision, Inc., (Cab. Serv. Bur., released January 10, 1995). The County filed a second FCC Form 328 on January 30, 1995, which became effective on March 1, 1995. A third FCC Form 328 was filed on February 7, 1995, which became effective on March 9, 1995. The County apparently sent their second FCC Form 328 by regular mail, followed with a third filing by registered mail.

[2] Section 1.106(g) of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days from the date that the petition is filed with the Commission. 47 C.F.R. § 1.106(g). An additional three days is allowed for filing the opposition if the petition for reconsideration is served on an interested party by mail. 47 C.F.R. § 1.4(h). Cablevision's petition was served on the County by mail, and the filing period for the opposition was 10 days or less. Accordingly, the filing period for the County's opposition was extended to Wednesday, April 13, 1995.

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Communications Act of 1934, as amended, and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a). One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable services of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543((l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] Both the Communications Act of 1934, as amended, and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. This definition is consistent with the plain meaning of the term "household" which is "a domestic establishment including the members of a family and others who live under the same roof." Webster's II at 595.

provides 1990 Census data[10] which shows that there are a total of 34,721 households in Hall County. To calculate the number of households in the unincorporated areas, Cablevision subtracts from the total number of households in Hall County (34,721), the household figures listed in the Census for each of the incorporated areas of Buford (10), Clermont (147), Flowery Branch (526), Gainesville (6,940), Gillsville (36), Lula (356), Oakwood (590) and Rest Haven (7). This calculation yields a total of 26,109 households in the unincorporated areas of Hall County. Cablevision also submits§ computer print-outs with sufficient subscriber information to support its claim that it serves a total of 1,899 households in its franchise area.[11] Finally, Cablevision provides a copy of the relevant pages of its franchise agreement which grants Cablevision the authority to serve the unincorporated areas of the County, and an affidavit by a responsible official certifying the accuracy of the data included in the petition.

4. The County asserts that Cablevision's effective competition claim is inappropriately based on areas unserved by Cablevision's cable system. It argues that Cablevision has made an affirmative decision to redefine its franchise area.[12] Specifically, the County alleges that Cablevision has had a franchise agreement authorizing service to the unincorporated areas of the County since July 27, 1987. The County claims that since shortly after entering the franchise agreement, Cablevision has "systematically limited the area in which it offers service to a small portion of the County not served by any other operator." As supporting documentation, the County provides a map of the County with marks highlighting the areas served by Cablevision and Gainesville Cable. The County also provides a copy of the franchise agreement with Cablevision, and the declaration of a responsible official who attests to the facts contained in the opposition. In addition, the County claims that the Commission's standard of proof for showing that a cable operator has redefined itsfranchise area is virtually impossible to meet.[13] Thus, it requests that we defer action on the petition until it is able to further investigate the situation. Alternatively, the County requests that we conduct our own investigation into whether Cablevision has limited its service.

5. In its reply to the County's motion to accept late filing and opposition to Cablevision's petition, Cablevision argues that the Commission should not accept the County's late opposition, as the County should have been aware that Cablevision would challenge the County's certification in light of our previous proceedings regarding this matter. In addition, Cablevision argues that the County's evidence is insufficient to prove that Cablevision has redefined its franchise area. In support of its argument, Cablevision provides the declaration under penalty of perjury of Mr. Turner O. Waide, Vice President of Lake Cablevision, Inc.[14] In Mr. Waide's declaration, he claims that Cablevision has expanded its subscribership in Hall County at an average of 10% per year from January 1, 1990 through January 1, 1994. He further declares that Cablevision "expects to continue its expansion into unserved areas of Hall County and is presently finalizing plans to provide service to additional homes in Hall County."

6. As a preliminary matter, we find unpersuasive the County's argument that Cablevision has failed to expand into parts of its franchise area served by another cable operator and therefore has redefined its franchise area. The assertion that Cablevision has, in essence, not filled out its entire franchise area, without more, is insufficient to establish that a cable operator has redefined its franchise area. As the Commission stated in its *First Recon. Order*, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[15] The County has pointed to no other facts, such as refusals of requests to expand service, agreements not to expand service,[16] or other evidence which could allow us to find that Cablevision has redefined its franchise area. Moreover, it is the franchising authority which has the burden of setting forth evidence sufficient to demonstrate that a cable operator has made an affirmative

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[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[11] Cablevision provides computer printouts with subscriber data for the areas designated by Cablevision as "Franchise Areas" 76, 77, 81 and 88. According to Cablevision, "Franchise Areas" 76, 77, 81 and 88 cover the unincorporated areas within Hall County, which is a single franchise area according to Cablevision's franchise agreement. These "franchise areas" account for 577, 873, 446 and 3 subscribers respectively.

[12] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1994) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision.... to restrict service." *Id.*

[13] The County argues that the only case, thus far, in which we have found that a cable operator has redefined its franchise area involved a cable operator in Cecil County, MD that acknowledged that its loan agreement prohibited expansion into areas served by other cable operators. *See Cecilton CATV, Inc., Petition for Reconsideration of Certification of Cecil County, Maryland to Regulate Basic Cable Service Rates*, DA 95-188 (Cab. Serv. Bur., rel. February 9, 1995) (*"Cecilton"*). The County argues that the standard set by our case law is too high, as no franchising authority would ever be able to demonstrate that a cable operator has entered into an agreement to limit service.

[14] *See* Reply of Lake Cablevision, Exhibit 1.

[15] *First Recon. Order*, 9 FCC Rcd at 1181.

[16] *See, e.g., Cecilton, supra* at footnote 13. We disagree with the County's assertion that no franchising authority is privy to the type of evidence of redefinition accepted by the Bureau in *Cecilton*. The County has not demonstrated that a franchising authority would not necessarily have access to this type of information. Moreover, our cases suggest that there are instances in which franchising authorities may be privy to evidence that a cable operator has entered into an agreement to limit its service area. *See, e.g., Telesat Cablevision, Inc. Petition for Reconsideration of Certification of Orange County, Florida to Regulate Basic Cable Service Rates*, DA 95-177 (Cab. Serv. Bur., rel. February 8, 1995), (*Telesat Cablevision*), at ¶ 4 and ¶ 7.

decision to limit its franchise area.[17] The facts set forth in the County's opposition do not meet this burden. As Cablevision has filed a petition as permitted by our rules, we do not find it appropriate to defer action on its petition, as the County requests.

7. Turning to the specifics of Cablevision's effective competition claim, in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[18] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[19] Cablevision has met this burden. Cablevision appropriately relied on data reflecting the number of households as required by our rules.[20] Relying on this data, Cablevision has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Hall County, its franchise area, serves 1,899 of the 26,109 households, or 7.3 percent of the households, within its franchise area. Thus, we find that Cablevision's system serving the unincorporated areas of Hall County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Lake Cablevision, Inc. challenging the certification of Hall County, Georgia to regulate basic cable rates IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Hall County, Georgia to regulate Lake Cablevision, Inc.'s basic cable rates IS RESCINDED.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[17] *First Recon. Order*, 9 FCC Rcd at 1181.
[18] 47 C.F.R. § 76.906.
[19] 47 C.F.R. § 76.911(b)(1).
[20] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CITY OF PHILIPPI, WEST VIRGINIA — CSR-4289-R

Petition for Special Relief

for Exemption from State and Federal Rate Regulation

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1995; Released: May 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On July 29, 1994, the City of Philippi, d/b/a Philippi Communications ("Philippi") filed a Petition for Special Relief ("Petition"), in which it requested that the Commission rule that its cable system is not subject to federal or state rate regulation, on the grounds that it is a government-owned cable system operating within the jurisdiction of the local government.[1] The State of West Virginia Cable Television Advisory Board ("Board") submitted an Opposition ("Opposition") to Philippi's Petition on August 8, 1994. In this Opposition, the Board opposed Philippi's effort to divest the Board of the authority to regulate Philippi's basic cable television rates in those areas outside of the City of Philippi (the "City"). The Board, however, did not oppose Philippi's Petition with regard to the rates charged within the City.

II. BACKGROUND

2. Section 623(a)(1) of the Communications Act of 1934, as amended, provides that "[n]o Federal agency, State or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction."[2]

3. In its petition, Philippi contends that it is not subject to state or federal rate regulation because its cable system falls within the provisions of Section 623(a)(1) of the Communications Act, as amended, in two separate franchise areas -- one within the City of Philippi, as well as one in the unincorporated areas of Barbour County, which is the County in which the City is located. With respect to its franchise area within the City, Philippi provides an affidavit from Joseph P. Mattaliano, City Manager of the City, who states that Philippi is owned and operated by the City, through its Municipal Building Commission. In addition, Philippi asserts that the City is authorized under state law to act as the cable system's franchising authority for the area within its city limits.[3] Mr. Mattaliano also states that the Philippi cable system is the only such system operating within the City.

4. Philippi also argues that the rates it charges in the franchise area that is outside of the City are not subject to federal or state rate regulation under Section 623(a)(1) of the Communications Act of 1934, as amended. Philippi submits a copy of its franchise agreement with Barbour County which authorizes Philippi "to serve those persons in the areas outside of the municipal areas in Barbour County."[4] As support for its argument that it is not subject to rate regulation within this franchise area, Philippi asserts that under West Virginia law, the City's municipal power, including its power as franchising authority, may be extended beyond the city limits.[5] Philippi asserts that, pursuant to this law, the City's power as franchising authority may be extended to cover those areas that its cable system serves outside of the limits of the City.

5. The Board does not dispute Philippi's claim that, within the boundaries of the City, Philippi's cable system is not subject to federal or state rate regulation under Section 623(a)(1) of the Communications Act of 1934, as amended. However, the Board does dispute Philippi's claim with respect to the area that its cable system serves outside of the City. Specifically, the Board argues that Philippi's claim with respect to the area outside of the City lacks merit because the extraterritorial powers granted by the West Virginia state law on which Philippi relies do not extend to the proprietary function of operating a cable system. Rather, the Board argues that the statute grants municipalities the authority to exercise power only in terms of governmental functions within the one mile zone when such power is "necessary to the reasonably efficient

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[1] The City's petition was placed on public notice on August 4, 1994.

[2] Communications Act of 1934 § 623(a)(1); 47 U.S.C. § 543(a)(1). We note that the Communications Act of 1934, as amended, also exempts those cable systems which are subject to effective competition. Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2). One of the bases by which a cable system is deemed subject to effective competition is if the cable system is operated by a franchising authority and the cable system offers video programming to at least 50% of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(c), 47 U.S.C. § 543(l)(1)(c). Philippi does not claim effective competition under this test nor does it provide facts sufficient to allow us to make that determination.

[3] Philippi cites West Virginia Law, under which "the franchising authority shall be the municipality in which a cable system is to be constructed, operated, acquired, or extended . . . ." W. Va. Code § 5-18-4(d).

[4] Agreement between Barbour County Commission and the City of Philippi, dated January 23, 1991. Exhibit No. 5, Petition. There is no indication that the area described is actually limited to one mile outside of the City of Philippi.

[5] Philippi derives this assertion of extraterritorial jurisdiction from West Virginia statutory law which it asserts authorizes municipalities to exercise extraterritorial power up to a maximum of one (1) mile outside of their corporate limits when the same is "necessary to the reasonably efficient exercise of such powers and authority within the corporate limits of the municipality." W. Va. Code § 8-12-19.

exercise of such powers and authority within the corporate limits." Since Philippi's franchise area outside the city limits is not "within its jurisdiction," as required by Section 623(a)(1), the Board argues that Philippi is not exempted from rate regulation in this franchise area.

III. DISCUSSION

A. The City of Philippi Franchise Area

6. We find that the rates charged by Philippi within the City are not subject to federal or state rate regulation pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended. As noted earlier, this provision applies in cases where: a) a cable system is owned and operated by a local government or franchising authority; b) within whose jurisdiction that cable system is located; and c) that cable system in question is the only cable system located with such jurisdiction. Here it has been demonstrated that Philippi's cable system is owned and operated by the City. In addition, the City has been empowered by the State of West Virginia to act as a franchising authority to the cable system in question. Thus, the cable system is located within the City's jurisdiction. Finally, the cable system in question is the only cable system located within the City. In light of these circumstances, we find that the rates charged by Philippi within its City of Philippi franchise area are not subject to federal or state regulation. Accordingly, with respect to the City of Philippi franchise area, Philippi's petition is granted.

B. The Barbour County Franchise Area

7. We, however, do not agree that the rates charged by Philippi in its franchise area in Barbour County are not subject to federal or state regulation. Specifically, we note that Philippi's authority to serve the unincorporated areas of Barbour County, including the areas Philippi serves within one mile of the city limits, derives from a franchise agreement with Barbour County and not with the City. The franchise agreement clearly states that "the Barbour County Commission has the full authority to grant the franchise right in the unincorporated areas of Barbour County. . ."[6] As such, with respect to areas outside of the City, Philippi's cable system is subject to the jurisdiction of Barbour County and not that of the City. Therefore, the requirements of Section 623(a) of the Communications Act of 1934, as amended, have not been met. In light of these circumstances, we can not find that the rates charged by Philippi's cable system in its Barbour County franchise area (including the one mile area outside of the City) are exempt from federal or state regulation. Accordingly, with respect to these areas, Philippi's petition is denied.[7]

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Philippi Communications' Petition for Special Relief, seeking exemption from state and federal rate regulation, is GRANTED with regard to Philippi's franchise area within the City of Philippi, West Virginia; and DENIED with regard to Philippi's franchise area encompassing unincorporated areas of Barbour County outside of the city limits of the City of Philippi, West Virginia.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[6] Exhibit 5, Petition.

[7] Philippi's argument that its rates both within the City and outside of the city limits are not subject to regulation appears to be based on an assumption by Philippi that the requirement of a uniform rate structure throughout a cable system's "geographic area" set forth in Section 623(d) of the Communications Act of 1934, as amended, prohibits it from charging rates within the City that are different from those charged outside of the city limits. *See* Communications Act of 1934, § 623(d), 47 U.S.C. § 543(d). We note, however, that in its *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5897 (1993), the Commission clarified that "for purposes of administration of Section 623(d), geographic area means franchise area."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Pinellas County, Inc.	CUID No. FL0716 (Oldsmar)
United Cable Television of Baltimore Limited Partnership	CUID No. MD0269 (Baltimore)
TCI Cablevision of Tulsa, Inc.	CUID No. OK0061 (Tulsa)
TCI Cablevision of North Texas, Inc.	CUID No. TX0642 (Allen)
TCI of Virginia, Inc.	CUID Nos. VA0067 (Orange) and VA0284 (Chesapeake)
TCI Cablevision of Washington, Inc.	CUID No. WA0166 (Lacey)
TCI of Tacoma, Inc.	CUID No. WA0187 (Tacoma)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1995; Released: May 25, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier and, thus, Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Furthermore, upon review of Operators' submissions for the franchise areas designated by CUID Nos. MD0269 and OK0061, we have found that the Operators miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to the Operators' calculations in their Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common

a. On its Form 393 filing for CUID No. MD0269, the Operator calculated the Inflation Adjustment Factor as of the end of December 1993. However, the Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than November 29, 1993.[12] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[13] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator should have used in justifying its rate for CUID No. MD0269, of 1.030.

b. On its Form 393 filing for CUID No. OK0061, the Operator calculated the Inflation Adjustment Factor as of the end of March 1994. However, the Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than January 5, 1994.[15] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through December 1993.[16] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[17] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operator should have used in justifying its rate for CUID No. OK0061, of 1.034.

6. For the remaining franchise areas, we have found no apparent errors in Operators' calculation of their maximum permitted rates. However, Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier. Accordingly, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operators filed:[18]

> On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operators used in justifying their rates, of 1.034.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[19]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth

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deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.956(a).

[13] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[15] *See* 47 C.F.R. § 76.956(a).

[16] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[18] *Id.*

[19] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

on Appendix A)[20] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[21]

12. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
FL0716	2/28/94	2/28/94
MD0269	11/17/93	10/28/93
OK0061	12/10/93	12/6/93
TX0642	2/28/94	2/28/94
VA0067	3/25/94	2/25/94
VA0284	2/28/94	2/28/94
WA0166	2/28/94	2/26/94
WA0187	2/28/94	2/28/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
FL0716	$11.98	$11.33
MD0269	$11.48	$11.39
OK0061	$10.98	$10.36
TX0642	$ 8.67	$ 7.59
VA0067	$10.64	$10.01
VA0284	$11.34	$10.79
WA0166	$10.64	$10.41
WA0187	$11.83	$11.20

[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[21] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-39

In re

Review of the Syndication and
Financial Interest Rules, Sections
73.659 - 73.663 of the Commission's Rules

ORDER DENYING MOTION FOR EXTENSION OF TIME

Adopted: May 24, 1995; Released: May 25, 1995

By the Chief, Mass Media Bureau:

1. On April 5, 1995, the Commission released a *Notice of Proposed Rule Making* (*"Notice"*), FCC 95-144, in this docket to conduct a review of the financial interest and syndication ("fin/syn") rules prior to their scheduled expiration in November 1995. This review and the scheduled expiration of the rules arise out of the timetable the Commission adopted in its 1993 *Second Report and Order* in MM Docket No. 90-162 (*"Second R&O"*).[1] As contemplated by the Commission's 1993 decision, the *Notice* lists a number of factors that will be relevant to the review of the rules, and places the burden of proof on those parties seeking continued fin/syn restrictions. The *Notice* also seeks comment on whether to accelerate the expiration date for the remaining fin/syn rules in the event parties arguing for their continuation fail to carry their burden of proof. The Commission established a deadline of May 30, 1995, for filing comments in response to the *Notice* and a deadline of June 14, 1995 for filing reply comments.

2. The Coalition to Preserve the Financial Interest and Syndication Rule (the "Coalition") has filed a motion seeking to extend the comment deadline to June 30, 1995, and the reply comment deadline to July 21, 1995.[2] The Coalition claims that this additional time will allow it to collect and analyze information concerning network negotiating patterns and acquisition of financial interests and syndication rights for the Fall 1995 television season. The National Broadcasting Company, Inc., Capital Cities/ABC, Inc. and CBS Inc. have filed oppositions to the Coalition's motion.

3. "It is the policy of the Commission that extensions of time shall not be routinely granted."[3] For the reasons set forth below, we do not believe the Coalition has established the exceptional circumstances or good cause necessary to justify the grant of its motion.

4. First, we believe parties have had a sufficient amount of time to gather and assess the information necessary to make a case that the fin/syn rules should be continued. The fourteen factors listed in the *Notice* as being relevant to the Commission's review of the rules are the same fourteen factors listed in the *Second R&O* released over two years ago on May 7, 1993. Moreover, the three networks have been operating for over 18 months under a relaxed fin/syn regulatory regime and without the restrictions imposed on them by antitrust consent decrees that paralleled the Commission's fin/syn rules.[4] We believe this is an adequate time period for parties to have examined network fin/syn practices for purposes of the Commission's review of the rules, whether or not they have obtained complete information concerning the Fall 1995 season. This 18-month period is part of the timetable established in the *Second R&O*, which sought to balance the Commission's need to exercise caution in deregulating in this area and the finding in its 1993 decision that the market conditions present at that time did not justify continuation of the fin/syn regime.[5] On appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed this timetable, stating that the "precise timetable on which the Commission executes a major turn in regulatory policy is a matter of judgment and prudence rather than of logic and measurement, and it is confided to the discretion of the Commission within broad limits not here exceeded."[6]

5. Second, it appears that there has been considerable information available for some time concerning the networks' activities with respect to the Fall 1995 season. According to the oppositions filed by the networks, NBC, ABC, and CBS announced their fall schedules on May 15, May 16, and May 24, respectively. The networks also state that the negotiations as to financial interest and syndication rights in the programs for next season have for all practical purposes been completed.[7] While the Coalition acknowledges in its motion that the networks will have announced their fall schedules prior to the May 30 comment deadline, it states that its task in gathering "the information we need at this time" has been hampered because "the very same people who are in a position to provide us with the information we have requested are tied up in the final stages of the negotiations regarding pickups and the terms thereof

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[1] 8 FCC Rcd 3282, *recon. granted in part, Memorandum Opinion and Order* in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993) (*"MO&O"*), *aff'd sub nom. Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).

[2] The Coalition states in its motion that INTV, the Media Access Project, and the Tribune Broadcasting Company support its extension request.

[3] 47 C.F.R. § 1.46(a).

[4] *See Notice* at ¶ 4 (describing timetable for review and expiration of fin/syn rules and antitrust consent decrees).

[5] *See Second R&O*, 8 FCC Rcd at 3303-08, 3337-40; *see also MO&O*, 8 FCC Rcd at 8279-80.

[6] *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

[7] *See* Opposition of NBC at 3-4 ("The fact is that, at least in NBC's case, negotiations for some programs began as early as September of last year and in all cases were completed before pilot production commenced, *i.e.*, before May 1, 1995. Thus, the producers of these programs have had all information relevant to network negotiation patterns and acquisitions of financial interests' in NBC's Fall 1995 prime time entertainment schedule for several weeks, if not months."); Joint Opposition of CBS and ABC at 2 ("The lengthy process of negotiations relating to the network distribution and back-end' rights to the programs on [the Fall 1995] schedules -- which would have revealed any network negotiating patterns' to the Hollywood community by now -- has for all practical purposes been completed.").

with the networks."[8] But, as just noted, two of the networks settled on their fall schedules at least two weeks before the May 30 comment deadline, and CBS did so nearly a week before the deadline. While this is undoubtedly a busy time of year for the television industry, this alone does not warrant an extension of the comment deadline, especially given that it appears that a considerable amount of information concerning network bargaining over next season's program schedule has been available for some time.[9]

6. Finally, granting an extension of the comment deadlines might compromise the Commission's consideration of its proposal to accelerate the scheduled expiration of the fin/syn rules in the event parties arguing for their continuation fail to carry their burden of proof. The *Notice* seeks comment on this proposal, and in the event fin/syn proponents do not meet their burden of proof, the Commission may deem it appropriate to free the networks from all fin/syn restraints immediately rather than waiting until the scheduled November 1995 expiration date.

7. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by the Coalition to Preserve the Financial Interest and Syndication Rules IS DENIED.

8. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

9. For additional information on this proceeding, contact Charles W. Logan (202/776-1653), Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[8] Coalition Motion at 3.
[9] *See, supra,* note 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Pacific Bell — Transmittal No. 1795
Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: May 25, 1995; Released: May 26, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 14, 1995, Pacific Bell filed Transmittal No. 1795 to revise its Tariff F.C.C. No. 128. Transmittal No. 1795, which is scheduled to become effective on May 29, 1995, would revise the service intervals in several Pacific Bell wire centers where expanded interconnection is offered. This transmittal would increase the service intervals from 90 or 105 days to 120 days in certain wire centers currently offering expanded interconnection. Transmittal No. 1795 would also decrease the service interval of the SNJSCA21 wire center from 300 days to 120 days.[1]

2. On May 1, 1995, MFS Communications Company, Inc. (MFS) filed a petition to reject, or suspend and investigate, the Pacific Bell transmittal. MFS contends that Pacific Bell should offer virtual collocation in lieu of physical collocation if it cannot meet a 90 day service interval to provide interconnection arrangements.[2]

3. On May 11, 1995, Pacific Bell filed a reply. Pacific Bell contends that the proposed service intervals are reasonable.[3] Additionally, Pacific Bell maintains that it would have to increase its rates for physical collocation if a 90 day service interval were required.[4]

4. Transmittal No. 1795 raises the same issues regarding rate levels, rate structures, and terms and conditions of service as those identified in the *Physical Collocation Tariff Suspension Order*.[5] Therefore, Transmittal No. 1795 is suspended for one day, following the effective date, and will be subject to the investigation initiated in the *Physical Collocation Tariff Suspension Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

5. IT IS ORDERED that the petition to reject, or suspend and investigate, Pacific Bell Transmittal No. 1795, Tariff F.C.C. No. 128, filed by MFS Communications Company, Inc. IS GRANTED to the extent indicated above and otherwise IS DENIED.

6. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1795, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

7. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

8. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

9. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

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[1] According to Pacific Bell, the service interval for the SNJSCA21 wire center had been temporarily increased to 300 days due to a building addition, which is now completed.

[2] MFS Petition at 2-3.

[3] Pacific Bell Reply at 3.

[4] *Id.*

[5] Ameritech Operating Companies, *et. al.*, CC Docket No. 93-162, Order, 8 FCC Rcd 4589 (1993) (*Physical Collocation Tariff Suspension Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 23, 1995

Released: May 26, 1995

Seth A. Davidson, Esq.
Fleischman and Walsh, L.L.P
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Davidson:

This letter is in response to your request for clarification of Sections 76.922(e)(5) and (e)(6) of the Commission's rules. Specifically, you request confirmation that Sections 76.922(e)(5) and (6), which relate to the movement of channels between tiers and the substitution of one programming service for another, are applicable to situations in which a cable operator deletes a channel from one regulated tier of service in order to free up capacity to add a new service to a different regulated tier.

As your letter indicates, Section 76.922(e)(5) addresses how an operator is required to adjust rates when it moves a channel from one regulated tier to another. If an operator moves a channel from one regulated tier to another, Section 76.922(e)(5) requires the operator to subtract out both the programming costs and the residual associated with a shifted channel. The residual and programming fees associated with the shifted channel would then be used as the residual and programming fees for the channel in its new regulated tier. However, an operator may not use the residual associated with a shifted cable programming service ("CPS") channel that was added pursuant to the *Sixth Order on Reconsideration* (*"Sixth Order"*) as the residual for a channel on the basic service tier ("BST").

In addition, Section 76.922(e)(6) addresses how an operator is required to adjust rates when the operator substitutes a new channel for an existing channel on the same regulated tier. Section 76.922(e)(6) requires that where an operator substitutes a new channel for an existing channel on a regulated tier, no per channel adjustment may be made. Operators also must adjust for any programming fee decreases related to the channel substitution and may adjust for any programming fee increases related to the channel substitution.

The Commission's rules, however, do not directly address applicable rate adjustments for an operator that drops a channel from one regulated tier and adds a new programming channel on a different regulated tier. You state that it is your understanding that where an operator drops one channel on a regulated tier and adds a new programming service on a different regulated tier Sections 76.922(e)(5) and (6) would apply in the following way. First, where a system drops a channel on one regulated tier to make room to add a new channel on another regulated tier, Section 76.922(e)(5) would require a reduction of the rate on the tier that lost a channel to reflect the decrease in programming costs and the residual on that tier. The residual for the dropped channel would then be shifted to the tier that was gaining a channel. Finally the programming costs for the new service channel would be added to the rate for the tier that was adding a channel in accordance with Section 76.922(e)(6).

We agree that your interpretation complies with the intent of these rules. Therefore, we find that where an operator drops a channel on a CPST (or BST) and simultaneously adds a new channel with new programming on the BST (or CPST), the residual associated with the dropped channel will serve as the residual for the tier adding a channel with new programming. While the total rate for both regulated tiers will not change, exclusive of the licensing fee for the new programming, the individual regulated tiers will be adjusted to account for the change in the number of channels on the tier. However, the residual associated with a dropped CPS channel that was added pursuant to the new channel adjustment methodology adopted in the *Sixth Order* may not serve as the residual for a new channel added simultaneously to the BST. The *Sixth Order* provides operators with up to a 20 cents per channel adjustment for new programming added to the CPST only, unless the operator is a single tier system. Our rules prohibit shifting a 20 cents per channel adjustment taken under the *Sixth Order* to the BST.[1]

We believe that this interpretation provides operators with a simplified mechanism for calculating the per channel adjustment for a channel when an operator drops a channel from one regulated tier while simultaneously adding a different programming channel to another regulated tier. We believe that this approach is preferable to the alternative of applying Sections 76.922(e)(5) and 76.922(e)(6) independently. Under that alternative, an operator would be required to shift the programming it wishes to drop to the new regulated tier in order to retain the residual associated with that channel. The operator then would be allowed to substitute new programming for the old programming while retaining the residual associated with the dropped channel. The operator would not be able to simultaneously make this switch. The methodology would be administratively burdensome and exalt form over substance. This new interpretation of the interplay between Section 76.922(e)(5) and (6) results in the same residual value that a literal interpretation of our rules currently provides and an easier mechanism for shifting channels.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See* 47 C.F.R. § 76.922(e)(5).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Northland Cable Television, Inc. CUID No. SC0168
(Pickens)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: May 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 31, 1995

CABLE SERVICES BUREAU ANNOUNCES AN EXTENSION OF TIME FOR WHICH RELEVANT FRANCHISE AUTHORITIES MAY "OPT OUT" OF THE SOCIAL CONTRACT FOR CONTINENTAL CABLEVISION, INC.

The Cable Services Bureau is extending the "opt out" period for franchise authorities under the proposed Continental Cablevision, Inc. ("Continental") social contract. Under the proposed Continental social contract, franchise authorities may elect to opt out of the basic service tier cost of service refunds by providing written notice to the Commission by June 6, 1995. The revised deadline to opt out is extended to two weeks after the release date of a Commission order adopting the social contract. The extension is made to assure that, before deciding to opt out, franchise authorities will have an opportunity to review the final terms and conditions of the social contract as adopted by the Commission. All such notifications by franchise authorities electing to opt out of the social contract should reference FCC 95-137 and should be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

News Media contact: Morgan Broman (202) 416-0852, Cable Services Bureau contact: JoAnn Lucanik (202) 416-0800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Shelby Cable, Inc. CUID No. AL0543
(Shelby County)

Complaints Regarding Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 30, 1995; Released: June 6, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Shelby Cable, Inc. ("Shelby") was charging for its cable programming service ("CPS") tier in Shelby County, Alabama. Shelby filed a motion to dismiss the complaints arguing that it is subject to effective competition and thus its cable programming service rate is not subject to regulation by the Commission.[1] Shelby did not file a rate justification as required by the Commission Rules.[2]

2. The first complete and timely complaint regarding Shelby's CPS rate for Shelby County, Alabama was filed with the Commission on November 1, 1993. In response to this complaint, Shelby filed a motion to dismiss on November 29, 1993. On December 23, 1994, Shelby filed additional information styled "Supplement to Motion to Dismiss." On April 12, 1995, Shelby submitted additional information in response to a request by Commission staff for further documentation.[3] Because in this Order we are dismissing the complaints on the grounds that effective competition ispresent, we find it unnecessary to rule on Shelby's other objections to the complaints filed against it in this franchise area.

DISCUSSION

3. In its Supplement to Motion to Dismiss, Shelby asserts that its cable system is subject to effective competition, and therefore its cable programming service rate is not subject to rate regulation, because it serves fewer than 30 percent of the households (*i.e.*, occupied housing units)[4] within its franchise area, the unincorporated area of Shelby County.[5] Specifically, Shelby claims that as of November 1993 and February 1994, it served a total of 5,794 and 5,863 subscribers, respectively, or 28 percent of the total number of households in the unincorporated area of Shelby County. Shelby states that, based on projected estimates prepared by CACI Marketing Systems (CACI) as of November 1993 and February 1994,[6] there were 20,596 and 20,772 households, respectively, in the relevant franchise area.[7] As supporting documentation, Shelby submits copies ofthe relevant 1990 Census data and a household trend report prepared by CACI from which the estimated 1993 and 1994 household data are derived. In addition, Shelby provides a computer printout as of November 1993 and February 1994 which indicates that it served 5,794 and 5,863 subscribers, respectively.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[9]

5. By its submissions, Shelby has demonstrated that its system met this statutory definition of effective competition at the time of the November 1993[10] complaint. As with our treatment of petitions for reconsideration of effective com-

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[1] 47 C.F.R. § 76.905.

[2] 47 C.F.R. § 76.956; *see also* Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752, para. 3(1) (Cab. Serv. Bur. 1994).

[3] Letter from Matthew P. Zinn, Attorney for Shelby Cable, Inc. to Zenji Nakazawa, FCC (April 12, 1995).

[4] As the Commission noted recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by the Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[5] The Communications Act of 1934, as amended (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a)) provide that only rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. The Communications Act of 1934, (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a) and (b)(1)).

[6] Although a cable operator may rely on 1990 census data to establish the number of households (that is, occupied housing units) in its franchise area, an operator may use more recent data if such data is available. *See* Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates, 9 FCC Rcd 3656, ¶ 3 (Cab. Serv. Bur. 1993).

[7] Shelby states in its pleading that, as of February 1994, there were 20,571 households in the relevant franchise area. However, based on the supporting information provided by Shelby, it appears that Shelby inadvertently entered the number of households in the incorporated area of Shelby County, and the correct number in the unincorporated area is 20,772. Specifically, Exhibit 2 of Shelby's Supplement to Motion to Dismiss indicates a penetration rate of 28.2 percent using 20,772 households as opposed to 20,571, which represents the total households in the incorporated area.

[8] 47 C.F.R. § 76.906.

[9] *Cf.* 47 C.F.R. § 76.911(b)(1) (setting forth standards governing petitions for reconsideration of local franchising authority's certification).

[10] Since the first complete and timely complaint was filed on November 1, 1993, we believe that the relevant time period for determining whether Shelby's system was subject to effective competition is November 1, 1993.

petition, we require cable operators to demonstrate a showing of effective competition using subscriber data at or around the time the request for certification was filed. According to Shelby's calculation, the total households figure for the unincorporated area of Shelby County as of November 1, 1993 was 20,596.[11] Thus, a comparison of the number of subscribers as of November 1, 1993 (5,794) in relation to the households figure (20,596) yields a penetration level of 28.1 percent.

CONCLUSIONS

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion of Shelby Cable, Inc. to dismiss the complaints against its cable programming service price charged in Shelby County, Alabama, CUID No. AL0543, IS GRANTED.

7. IT IS FURTHER ORDERED that the complaints against the cable programming service price charged by Shelby Cable, Inc. in Shelby County, Alabama, CUID No. AL0543, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[11] According to the 1990 Census, there were 18,290 households in the unincorporated area of Shelby County as of April 1, 1990 (total households in the county [35,985] - total households in the incorporated areas [17,695] = total households in unincorporated areas [18,290]). According to the CACI estimate for July 1994, there were 21,283 households in the unincoporated area of Shelby County. The difference between the 1990 Census data and 1994 CACI estimates shows an increase of 2,993 households in the unincorporated area of Shelby County over a period of 51 months (number of months from April 1990 to July 1994). To calculate the households figure as of November 1993, Shelby multiplied 2,993 (the number of increase in households) by 43/51 (the ratio of the number of months from April 1990 to November 1993 to the number of months from April 1990 to July 1994) to arrive at an increase of 2,524 households over 43 months. Hence, the estimated households figure as of November 1993, as revised, is 20,814 (18,290+2,524). But because CACI's 1990 census report is based on census blocks as opposed to census tracts, its reported 1990 household number was 218 households greater than the 1990 Census. To compensate for this deviation, Shelby has subtracted this household amount from its projected November 1993 household total to arrive at 20,596 (20,814-218). Thus, Shelby argues that a comparison of the number of subscribers (5,794) in relation to the adjusted household figure (20,596) yields a penetration level of 28.1 percent. We note, however, that even if the unadjusted household figure (20,814) were used, Shelby's penetration level would be below 30 percent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Public Cable Company — CUID No. ME0093 (Westbrook)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1995; Released: June 6, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 272
Tariff F.C.C. No. 1

ORDER

Adopted: May 17, 1995; Released: May 18, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 6, 1995, BellSouth filed Transmittal No. 272 to introduce a new service offering called "Inward Operator Service" (IOS). Transmittal No. 272 is scheduled to become effective on May 20, 1995. IOS will provide the capability to verify the line status of a local exchange customer as well as to interrupt the called line on behalf of an interexchange carrier's (IXC's) customer. D&J at 1. Using this service, a BellSouth operator will, upon request, monitor the status of a subscriber line and report this status to the IXC operator. The IXC operator will relay this information to the end user. *Id.* at 2-3. If the line is in use, the IXC's end user may request that the call in progress be interrupted to inform the BellSouth local exchange customer of an emergency need to reach the number. The BellSouth operator will then interrupt the call in progress, inform the subscriber that the IXC's end user has an emergency need to reach the line, and ask the subscriber if he or she is willing to terminate the call in progress. *Id.* The IXC operator can then inform the end user that the subscriber line in question will be free momentarily and the end user may redial. *Id.*

2. On March 21, 1995, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 272, to which BellSouth replied on March 30, 1995. MCI argues that BellSouth has not used a uniform overhead loading for comparable services, as required by the Commission's rules,[1] nor has BellSouth made a showing justifying departure from uniform loadings. MCI Petition at 2. Specifically, MCI claims that it was incorrect for BellSouth to use the 2.81 revenue/cost ratio for interexchange services to determine the overhead loadings for the new IOS service. *Id.* MCI also claims that IOS is an access service, and thus the appropriate loading factor should be 1.17, the revenue/cost ratio for the information category. *Id.* at 3. MCI then argues that BellSouth failed to provide the complete cost and demand analysis on which its rates for the new service are based. *Id.* at 4-5.

3. In its reply, BellSouth states that the Commission rules[2] unambiguously place costs for operator services (excluding directory assistance) in the interexchange category. BellSouth Reply at 2. BellSouth states that its adopted approach, using the overhead loading applicable to the interexchange category, represents an appropriate benchmark to assess the reasonableness of IOS overheads. *Id.* BellSouth also claims that MCI's attempted comparison of other carriers' IOS rates is incorrect because the costs and rate structures for these local exchange carriers display wide variations. *Id.* at 3. BellSouth states that its filing can only be evaluated through reference to the documentation pertinent to BellSouth and that this documentation is adequate to meet price cap requirements. *Id.* Also, BellSouth states that it will maintain separate accounts for costs attributable to its provisioning IOS and will allocate such costs to IOS rate elements pursuant to the Bureau's instructions for allocating the costs of operator services.[3] IOS costs will thus not be allocated to the interexchange category.[4]

4. The Tariff Division has reviewed BellSouth's Transmittal No. 272 and the related pleadings. We conclude that BellSouth's filing is not patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate BellSouth's revisions to Tariff F.C.C. No. 128, Transmittal No. 272, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

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[1] Amendments of Part 69 of the Commission's Rules Relating to Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 97-313, Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd 5235 (1992).

[2] 47 C.F.R. §§ 69.306(b), 69.404.

[3] *See* In the Matter of Ameritech Operating Companies, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Transmittal Nos. 425, 467, Memorandum Opinion and Order, 6 FCC Rcd 1541 (1991).

[4] In support of its tariff filing, BellSouth filed a letter stating that it intends to maintain separate accounts for costs attributable to its provisioning of IOS and to allocate such costs to IOS rate elements established pursuant to the Commission's Part 69 waiver, rather than to the interexchange category. Letter from W.W. Jordan, BellSouth Executive Director-Federal Regulatory, to Geraldine Matise, Chief, Tariff Division, Common Carrier Bureau, May 3, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FALCON CABLEVISION,
Petitioner,

v.

CITY OF THOUSAND OAKS, CALIFORNIA,
Respondent.

Appeal of Local Rate Order of
City of Thousand Oaks, California.

ORDER

Adopted: May 17, 1995; Released: May 19, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 1, 1994, Falcon Cablevision ("Falcon"), the franchisee in the above matter, filed an appeal of the local rate order. The local rate order was adopted on August 2, 1994 by Falcon's franchising authority, the City of Thousand Oaks, California ("the City"). In the local rate order, the City established regulated rates for basic cable service and associated equipment provided by Falcon, as allowed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The local rate order requires Falcon to implement certain rate reductions and to issue refunds to subscribers for overcharges levied during the period from September 1, 1993 to July 14, 1994. The City opposes Falcon's appeal.[2]

2. In its review of Form 393, Falcon contends, the City improperly reduced its Hourly Service Charge ("HSC"), thereby precluding it from fully recovering its equipment and installation costs. Falcon further contends that because of this misapplication of the Commission's rate regulations, the City has improperly imposed a refund liability that is greater than the level allowed under our rules.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

A. FCC Form 393

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the timep period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is

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[1] Under the 1992 Cable Act and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b).

[2] The City filed its opposition on September 14, 1994 to which Falcon filed a reply on September 28, 1994.

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in I mplementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

B. Hourly Service Charge

6. The issue raised by Falcon relates to the number of labor hours used in calculating Falcon's Hourly Service Charge ("HSC") and Falcon's installation and equipment rates on FCC Form 393, Part III. Falcon asserts that the City improperly denied it full recovery of the costs associated with providing regulated customer equipment and installations by increasing the total number of labor hours in the calculation of the HSC by including, what the parties refer to as, "indirect" and "direct" labor hours, while limiting the number of labor hours in the calculation of regulated customer equipment and installation charges to direct labor only.[9] Falcon contends that if we determine that the City's action in increasing the number of labor hours in calculating the HSC was reasonable, then Falcon must be permitted to account for the indirect hours added by the City in the calculation of its regulated customer equipment and installation charges.

7. Under our rules and Form 393, an operator's regulated customer equipment and installation charges are limited to its actual costs, plus a reasonable profit.[10] The converse is that an operator must be permitted to recover all its costs associated with providing those equipment and installations, including a reasonable profit.[11] These costs are known as the Equipment Basket costs.[12] The charges for installations and equipment derived in Part III of Form 393 are calculated to provide for recovery of these costs. The HSC methodology "uses time spent in related activities as the factor for allocating [installation and equipment maintenance] costs to the various charges."[13] Central to the derivation of the permitted installation and equipment charges is the calculation of the HSC.[14] The HSC is derived by dividing the operator's annual customer equipment maintenance and installation costs by the total number of hours spent on maintenance and installation of customer equipment in the year. An operator may charge customers for installations based on the HSC multiplied by the number of hours spent on a particular installation, or alternatively, it can establish fixed charges for various types of installations by multiplying the HSC by the average time it takes to do each type of installation. An operator's various equipment lease charges are derived by multiplying the HSC by the total number of hours a year the operator spends maintaining and servicing the equipment, plus the annual capital costs for that equipment, and then allocating this total amount over the number of equipment units in service.

8. Neither our rules nor FCC Form 393 specifies a particular method for counting labor hours; the form's instructions require operators only to explain how they derived the figures they report and we have therefore seen a variety of approaches. Using installation service as an example, an operator may count only the time an installer is actually at a subscriber's premises performing the installation (so-called direct hours). Another operator may also include the time spent driving to and from the premises (so-called indirect hours), while another operator may take a different approach by counting an installer's total paid time and dividing by the number of installations performed. Some operators may also include supervisory time. As we explain herein, none of these approaches is necessarily "better" than others, they are simply different ways of allocating costs to services. In reviewing an operator's HSC calculations, the primary concern should be to insure that its Equipment Basket costs are fully recovered, not how the operator counted its labor hours. In order to insure full recovery, an operator must be permitted to use the same method of counting person hours in calculating the HSC as it does in calculating the specific charges for its various installations and equipment.[15] If an operator had to include both direct and indirect labor hours in the HSC but only direct hours in calculating the various installation and equipment charges, the HSC would be smaller than if indirect hours were considered and this smaller HSC would then be multiplied by smaller equipment and installation labor hour amounts than if both direct and indirect hours were included in those calculations. An operator would not recover all its costs if this was the case.[16]

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[9] We note that our rules and Form 393 do not mention or provide any definition of direct or indirect labor hours. Form 393 only requires an operator to use the "total number of person-hours" spent in service installation and maintenance of customer equipment in calculating its HSC. The parties have used the terms "direct" and "indirect" hours (on their own) to define how they arrived at these total labor hours. As described herein, how these terms are defined with respect to counting labor hours is not crucial for purposes of Form 393. As long as the same method of counting hours is applied in calculating both the HSC and the various installation and equipment rates, the operator will be able to recover the proper amount of costs. For the convenience of the parties, however, we use the terms direct and indirect hours, as used in the parties' pleadings, for the purposes of this order.

[10] 47 C.F.R. § 76.923(c).

[11] *Id.*

[12] 47 C.F.R. § 76.923(a). *See Rate Order*, 8 FCC Rcd at 5815-16 (1993).

[13] *Rate Order*, 8 FCC Rcd at 5817 (1993).

[14] 47 C.F.R. § 76.923(d).

[15] Stated another way, correct application of the HSC methodology requires that recoverable costs be allocated to the labor hours through which they can be recovered.

[16] A simple example should help illustrate the point. Assume a small operator with no leased equipment that performed one installation per year. Further assume that the installation took two hours, one direct and one indirect, and that the operator's costs for the installation were $80. The HSC would be $80 if computed using only direct labor hours, and $40 if using direct and indirect hours. In order to fully recover its costs, the operator must be permitted to either use only direct hours in both calculation of the HSC and the installation charge, or direct and indirect hours in both calculations. In our example,

9. Falcon included only direct labor hours in calculating its original HSC.[17] In its review of Falcon's Form 393, the City recalculated the HSC by including indirect labor hours as well as direct hours. Since the City's recalculations apparently did not involve the same method for counting the labor hours for the various installation and equipment charges, they preclude full recovery of Equipment Basket costs and therefore conflict with 47 C.F.R. § 76.923(a). We must therefore remand this issue to the City to ensure that the associated indirect labor hours added by the City are also accounted for in the calculation of rates for the various installation and equipment charges. As long as a franchising authority uses the same method for counting both the total number of labor hours in calculating the HSC and the labor hours for the various installation and equipment charges in reviewing an operator's Form 393, then its HSC review will result in proper cost recovery.[18] Moreover, no additional refund liability should result from the franchising authority's decision to include (or exclude) indirect hours in an operator's HSC calculation as long as it employs the same method for counting the labor hours in calculating the HSC as in calculating the various installation and equipment charges.

III. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that Falcon's appeal of Thousand Oaks' local rate order is REMANDED, with the above instructions, to the City of Thousand Oaks, California for further action in accordance with this order.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

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Meredith J. Jones
Chief, Cable Services Bureau

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the two options that would allow full cost recovery are: $80 HSC x 1 hour = $80 (using only direct labor hours); and $40 HSC x 2 hours = $80 (using direct and indirect hours). On the other hand, using direct and indirect hours to compute the HSC and using only direct hours to calculate the installation charge would result in under-recovery of costs: $40 HSC x 1 hour = $40.

[17] Falcon states that its practice is to charge subscribers for installations based only on the time that an employee spends at a subscriber's premises performing the installation. In its Form 393, therefore, Falcon included 100% of the salaries of its installation staff, but less than 100% of their total work time. Falcon claims the less-than-100% figure represents the percentage of time installation personnel are actually "in the field" (direct hours). Falcon refers to direct hours as billable hours, which it defines as the time that its installation staff spends at a subscriber's residence performing installation or maintenance work. Falcon's billable hours definition does not include time spent driving to and from subscribers' premises, carrying out administrative chores such as stocking equipment, performing disconnects and conducting service downgrades. Falcon refers to these person hours as non-billable (indirect hours).

[18] *See* Harron Communications Corporation (Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich, Mass.), DA 95-160 (released February 7, 1995) (*"Harron"*). In *Harron*, the franchising authority included only direct labor hours in calculating the operator's HSC. Since the franchising authority used the same method for counting the operator's labor hours in calculating both the HSC and the various installation and equipment charges, we held that the franchising authority's action was reasonable. The franchising authority's action did not affect the operator's total cost recovery or its total refund liability.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US Cable of Northern Indiana — CUID No. IN0225 (Griffith)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 1, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Cablevision of Massachusetts, Inc.	CUID No. MA0162 (Merrimac)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1995; Released: June 1, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was completed and served on Operator on January 26, 1994 and received by the Commission on February 2, 1994. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 on June 24, 1994.[11]

5. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted rate for the CPS tier of $11.02 per month (plus franchise fee). However, Operator's actual monthly charge for its CPS tier was $11.10 (plus franchise fee). Thus, Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Form 393, Part III, Schedule C, Operator depreciated its non-addressable converters over a useful life of 15 years. The industry average for the useful life of converters is approximately 10 years. We therefore recalculated Operator's annual depreciation expense on non-addressable converters using a 10-year useful life.[12] This adjustment increases Operator's annual depreciation expense for non-addressable converters from $7,649 to $11,399.

b. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Cf*. United Video Cablevision Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, para. 10b (Cab. Serv. Bur., released Nov. 9, 1994).

for the date for which Operator filed Form 393.[13] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of January 1994. Using data released on July 29, 1994, the United States Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.037 as the Inflation Adjustment Factor through January 1994, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $11.00 per month (plus franchise fee) for the period from February 2, 1994 to May 14, 1994.[14] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $11.00 (plus franchise fee).[15]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-97

In the Matter of

GTE System Telephone Companies Transmittal No. 143
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 25, 1995; Released: May 26, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 14, 1995, GTE System Telephone Companies (GSTC) filed Transmittal No. 143 to revise its Tariff F.C.C. No. 1. Transmittal No. 143, which is scheduled to become effective on May 29, 1995, would establish, *inter alia*, a cable space charge and cable pull charge for the San Bernardino, California wire center. No petitions were filed against the GTE transmittal.

2. The transmittal filed by GSTC raises the same issues as the permanent virtual collocation tariffs that were suspended for one day and made subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*.[1] Therefore, the above-captioned transmittal, in so far as it applies to virtual collocation, is suspended for one day, until May 30, 1995, and will be subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*. This transmittal will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the above described revision to GTE System Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 143, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that GTE System Telephone Companies SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. GTE System Telephone Companies should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), GTE System Telephone Companies shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies *et. al.*, CC Docket No. 94-97, Order, 10 FCC Rcd 1960 (1994) (*Virtual Collocation Tariff Suspension Order*). The *Virtual Collocation Tariff Suspension Order* suspended for one day and initiated an investigation of the permanent virtual collocation tariffs filed on September 1, 1994 by the Tier 1 local exchange carriers subject to expanded interconnection requirements. In the *Phase I Designation Order*, the Common Carrier Bureau designated issues for investigation regarding the overhead loadings in the LECs' interim and permanent virtual collocation tariffs. The Bureau stated that it would designate additional issues regarding rate levels, rate structures, and terms and conditions of service in the second phase of its investigation. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Order Designating Issues for Investigation, DA 95-374 (released Feb. 28, 1995) (*Phase I Designation Order*). In an Order released on May 11, 1995, the Commission concluded the first phase of its investigation by prescribing the maximum permissible overhead loading levels for most LECs' virtual collocation rates. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Report and Order, FCC 95-200 (released May 11, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C4 MEDIA CABLE SE, L.P.

Petition for Review of Local Rate Order
of the City of Chatsworth, GA

Emergency Petition for Stay of Local
Rate Order of the City of Chatsworth, GA

ORDER

Adopted: May 30, 1995; Released: June 1, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 10, 1995, C4 Media Cable SE, L.P. ("C4"), the franchisee in the above matter, filed an appeal of a local rate order adopted by the City of Chatsworth, Georgia (the "City") on December 6, 1994.[1] On January 25, 1995, the City filed an opposition to C4's appeal urging the Commission to either dismiss C4's appeal as untimely filed, or, in the alternative, to deny C4's appeal and to allow the City's rate order to go into effect unchanged. C4 filed a reply to the City's opposition on February 1, 1995.

2. In its rate order, the City established rates for C4's basic tier service and associated equipment and installations and required C4 to refund overcharges to subscribers for the period of time between September 1, 1993 and May 14, 1994.[2] In its appeal, C4 raises four issues relating to (a) its refund liability under the local rate order; (b) the City's recalculation of the inflation adjustment factor on its FCC Form 393; (c) the City's rejection of its proposed Hourly Service Charge; and (d) the City's rejection of its cost of service justification. In its opposition, the City responded to each of the issues raised by C4, and also argued that the Commission should dismiss C4's appeal since it was not filed with the Commission within thirty (30) days of the release of the text of the local rate order.[3] In its reply, C4 maintains that its appeal was filed within the time period prescribed by the Commission's rules.

II. DISCUSSION

3. Under the Commission's rules, any participant in a ratemaking proceeding at the franchising authority level may appeal a franchising authority's rate decision with the Commission within 30 days of the release of the text of that decision.[4] In the instant case, the parties disagree as to what constitutes the release of the text of the City's local rate order. The City claims that the text of the local rate order was released on December 6, 1994, the date of the public meeting at which the City adopted the local rate order. The City asserts that the local rate order was read aloud at the meeting and that copies of the rate order were made available at this meeting. Thus, it is the City's position that C4 had until January 5, 1995, which is 30 days subsequent to the December 6, 1994 meeting, to file an appeal of the City's local rate order with the Commission. Since C4's appeal was not filed with the Commission until January 10, 1995, the City contends that it should be dismissed as untimely filed.

4. C4 does not specifically deny that copies of the local rate order were made available at the hearing. C4 claims only that the City did not provide it with a copy of the local rate order until December 13, 1994, the date upon which C4 received a copy of the order from the City by certified mail. Accordingly, C4 contends that its appeal was not due until January 12, 1995. Thus, it is C4's position that its appeal, which was filed with the Commission on January 10, 1995, was timely filed.

5. We conclude that C4's appeal of the City's local rate order was due on January 5, 1995. The City states that the text of the City's local rate order was released to the public at the City's December 6, 1994 meeting. Our rules provide that an appeal of such an order must be filed within 30 days after such release.[5] Although C4 may not have received a copy of the local rate order at that meeting, C4 acknowledges that the rate order was read aloud and adopted at that meeting and does not specifically deny that copies of the order were made available at that time. The City fulfilled its obligations under our rules, which require that franchising authorities provide public notice of any written rate order and release the text of such order to the public.[6] The fact that C4 did not receive a copy of the local rate order at the time of its release is not determinative as to whether or not the order was released to the public. C4's appeal of the City's local rate order was due at the Commission by January 5, 1995, which was 30 days subsequent to the date on which the text of the rate order was released to the public. As noted in paragraph 1, *supra*, C4's appeal was filed on January 10, 1995.[7] C4's appeal is therefore dismissed as untimely filed.

---

[1] On January 10, 1995, C4 also filed an Emergency Petition for Stay of the City's local rate order.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b). The City's local rate order states that C4's refund liability period shall run from September 1, 1993 through the date on which C4 "became subject to the Amended Rules." Local rate order at 4. The Commission's amended cable rate rules became effective on May 15, 1994.

[3] *See* 47 C.F.R. §76.944(b).

[4] 47 C.F.R. § 76.944(b).

[5] 47 C.F.R. §76.944(b).

[6] *See* 47 C.F.R. §76.936(b).

[7] The Commission permits operators to file a late pleading, including appeals from local rate orders under the 1992 Cable Act, only upon a showing of good cause. *See* In the Matter of Meredith/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841 (1994). In the instant case, C4 has not attempted to establish good cause for the late filing of its appeal.

6. In light of the dismissal of its appeal herein, C4's Emergency Petition for Stay, pending the resolution of its appeal, is rendered moot and is, therefore, also dismissed.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Appeal filed by C4 Media Cable SE, L.P. is DISMISSED.

8. IT IS FURTHER ORDERED that, in light of the dismissal of its Appeal, the Emergency Petition for Stay filed by C4 Media Cable SE, L.P. is DISMISSED as moot.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 26, 1995

IN REPLY REFER TO:
DA 95-1175

Wesley R. Heppler, Esq.
Paul Glist, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3458

Dear Mr. Heppler and Mr. Glist:

This is in response to your letters of August 8, September 19, and October 28, 1994 on behalf of "numerous cable television programmers and operators," seeking clarification that in requesting approval of external programming cost pass throughs on the basic level of service pursuant to Section 76.922(d)(3) of the Commission's rules, cable television operators are not required to provide individual programming contracts that are confidential in nature to local franchising authorities. In order to provide local authorities with sufficient information to conduct the necessary review while maintaining the confidentiality of the contracts in question, you suggest use of a process similar to that previously adopted by the Commission in the SCIS Disclosure Order, 7 FCC Rcd 1526 (1992).

You state that programming contracts between cable operators and programmers are nearly always confidential and that there would be practical and legal problems associated with maintaining the confidentiality of these contracts if franchising authorities are permitted to examine them. First, you state that with distribution of these contracts to a large number of franchising authorities, it would be impossible to maintain the confidentiality of these contracts. Second, you state that, in certain states, municipalities do not have the legal ability to maintain confidentiality because there is no recognition of the confidentiality of financial data and proprietary business information in those states and such information must, therefore, be treated as public information. Further, you state that programmers likely will seek to enforce the contract confidentiality provisions in these contracts and cable operators may be prevented from disclosing these contracts to franchising authorities.

In light of these concerns, you recommend that a cable operator could provide support for the aggregate programming cost increases contained in the FCC Form 1210 by providing a certification from an independent accounting firm retained by the operator as to the appropriate programming cost increases or decreases. If the franchising authority wants further verification, you recommend that the franchising authority be permitted to ask the Commission to make an in camera review of the contracts.

Under your proposed procedures, the firm making the certification would have to be a recognized and established accounting firm and the cost of the certification would be borne by the cable operator. The accounting firm would review the relevant programming contracts and calculate the appropriate programming cost increases or decreases. In making its independent verification, the accounting firm would, as necessary, complete the following tasks:

1. Reconcile the accuracy of the number of subscribers from appropriate billing reports.

2. Recalculate the "Cost of Old Programming per Tier" through a review of all programming contracts and contract rate cards.

3. Recalculate current programming cost through a review of all programming contracts and rate cards as of the appropriate regulatory external pass through quarterly date.

4. Review channel line up cards for each relevant time period to determine changes in channels per tier. For each tier, recompute the programming cost calculations required by Module B in Form 1200 or Form 1210.

5. At the conclusion of the above procedures, if differences are found, the specific differences must be noted in the independent accountant's report.

In conducting its independent verification, the accounting firm would follow the auditing standards adopted by the American Institute of Certified Public Accountants, Inc. for "Special Reports - Applying Agreed-Upon Procedures to Specified Elements, Accounts, or Items of a Financial Statement." *See* Statement on Auditing Standards No. 35.

If, after receiving the accounting certification from the cable operator, the local franchising authority desired further verification of programming costs, you propose that the franchising authority could request that the Commission undertake an *in camera* review of the programming contracts at issue. Upon such a request, a cable operator would be required to submit these contracts to the Commission for review. Local franchising authorities could not delay making their decision on the FCC Form 1210 while the request for *in camera* review was pending before the Commission. Upon completion of an *in camera* review of the contracts, the Commission would determine the accuracy of the Form 1210 figures supplied by the cable operator. The local authority would then be notified of the Commission's findings. If the Commission's *in camera* review ultimately determined that the programming cost figures provided by the cable operator were inaccurate, appropriate refunds and/or forfeitures could be ordered.[1]

[1] We have received several letters from cable programmers in support of your proposal and the reasoning that underlies it. (*See* Letters of Turner Broadcasting System, Inc., dated December 2, 1994; Arts & Entertainment Network, dated December 6, 1994; Lifetime Television, dated December 7, 1994; USA Networks, dated December 8, 1994; Black Entertainment Television, dated December 9, 1994; The Disney Channel, dated December 12, 1994; ESPN, Inc., dated December 13, 1994; and Donna C. Gregg of Wiley, Rein & Fielding, on behalf of E! Entertainment Television, Inc., dated December 19, 1994, forwarding letter of E! Entertainment Television, Inc., dated December 16, 1994.)

We have received several letters objecting to your proposal.[2] Among the objections raised in one or more of the responses are the following:

> 1. Your proposal conflicts with our rate regulation rules, which provide that local franchising authorities will have access to cable operators' proprietary information, even though such information may be publicly released pursuant to state or local law.
>
> 2. There can be no modification of that policy without a formal rulemaking.
>
> 3. The 1992 Cable Act requires that rates be reviewed and set by local franchising authorities and the Commission, not by private parties.
>
> 4. There is no reason why programming contracts should be treated differently from other proprietary information handled daily by state and local regulatory bodies.
>
> 5. There is no evidence that local franchising authorities are not competent to maintain the confidentiality of programming contracts.
>
> 6. There is no evidence that cable operators are contractually bound to withhold the terms of programming contracts, or that such agreements would be legally enforceable.
>
> 7. There is no evidence of the alleged harm from disclosure of programming contracts, because much of the purportedly sensitive information is already available to cable competitors.
>
> 8. The periodic disclosure of programming contracts would foster competition and keep rates down by requiring cable operators to disclose their rates, thus permitting other cable operators and other multichannel video programming distributors to bargain more effectively for similar terms and conditions.
>
> 9. Accounting firms hired by cable operators would not be impartial arbiters, but would be biased in the cable operators' favor.
>
> 10. *In camera* Commission review would only extend the already protracted rate review process, and further tax the Commission's limited resources.

After careful consideration of the various submissions, we decline to address the merits of your proposal here in the absence of a rulemaking proceeding. In our Third Order on Reconsideration of cable rate regulation, released March 30, 1994, we reaffirmed that local franchising authorities had the right to collect additional information -- including proprietary information -- that is "reasonably necessary to make a rate determination." (*See* Third Order on Reconsideration ("Order"), 9 FCC Rcd. 4316 (1994), at ¶ ¶ 77-78.)[3] In obtaining proprietary information, we required franchising authorities to state clearly the reason each request was needed, and where related to an FCC Form 393 (and/or FCC form 1200/1205), to indicate the question or section of the form to which the request specifically relates. (Order at ¶ 77.)

Once proprietary information is submitted, the Order specifically held that the confidentiality of such information should be determined on the state and local level, notwithstanding the fact that the operation of certain state or local laws might lead to the information's public disclosure:

> We find it neither necessary nor desirable to preempt state and local laws governing access to information. Rate regulation of basic cable services has been designated by the Congress and this Commission as an essentially local matter, and it involves local businesses providing local services. Local (including state) governments have instituted access laws to govern the confidentiality of the business information of the business entities in their respective jurisdictions as they have seen fit for their particular circumstances and interests. We see no reason sufficiently compelling to override that prerogative.

(Order at ¶ 79.)[4] No Petitions for Reconsideration were filed on this issue.

In essence, your proposal would require us to issue a blanket exemption from our general rules for a single type of allegedly proprietary information -- i.e., programming contracts. Whatever the merits of that proposal, we believe that its adoption would constitute a clear modification -- rather than simply a clarification -- of the Commission's rules. We decline to consider such an action here without providing public notice and an opportunity for comment.

Nevertheless, we wish to emphasize that the Commission's ruling provides that franchising authorities may only request information that is "reasonably necessary" to their rate-setting function. (Order at ¶ 77.) We believe that confidential programming contracts may contain a substantial amount of information that does not meet that standard, the production of which would unnecessarily risk the disclosure of sensitive business information. We therefore expect local franchising authorities to be judicious in their requests for programming contracts, to make sure that the information is needed, and to narrow their requests, if appropriate, to permit cable operators to submit only the specific information required. We urge franchising authorities and cable operators to adopt procedures that will achieve the proper balance between the franchising

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[2] *See* Letters from Mr. Joseph Van Eaton of Miller, Canfield, Paddock and Stone, client not identified, dated October 20, 1994; Mr. John W. Pestle and Mr. Patrick A. Miles of Varnum, Riddering, Schmidt & Howlett, on behalf of "over 200 franchising authorities," dated October 27, November 29 and December 5, 1994; and Mr. Norman M. Sinel of Arnold & Porter, on behalf of the National Association of Telecommunications Officers and Advisors, dated November 4, 1994.

[3] We also stated that, in appropriate circumstances, the right of access to proprietary information could extend to other parties in a rate proceeding, and that franchising authorities should adopt procedures or protective agreements to ensure that the proprietary information would not be disclosed to the public. (Order at ¶ 78, n.42.)

[4] These holdings were codified in 47 C.F.R. § 76.938: "A franchising authority may require the production of proprietary information to make a rate determination . . . Public access to such proprietary information shall be governed by applicable state or local law."

authority's right to review relevant information and the cable operator's interest in maintaining the confidentiality of sensitive business information.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: Mr. Joseph Van Eaton, Esq.
Mr. John W. Pestle, Esq.
Mr. Norman M. Sinel, Esq.
Mr. Nickolas Davatzes (A & E Network)
Ms. Jane Tollinger (Lifetime Television)
Mr. Stephen A. Brenner (USA Networks)
Ms. Maurita K. Coley (BET)
Mr. Frederick Kuperberg (Disney Channel)
Mr. Bertram W. Carp (Turner Broadcasting)
Mr. Mark Feldman (E! Entertainment Television)
Ms. Donna C. Gregg, Esq.
Mr. Edwin M. Durso (ESPN)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

WSUV, Inc.
For Consent to Assignment
of License of File No. BALH-930903GI

FM Broadcast Station WROC,
Fort Myers Villas, FL

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1995 Released: August 21, 1995

By the Commission:

1. The Commission has under consideration an Application for Review filed on April 15, 1994, by Miracle Broadcasting, Inc. ("Miracle").[1] Miracle seeks reexamination of the March 16, 1994, action by the Mass Media Bureau ("Bureau") denying Miracle's Petition to Deny and granting the above-referenced assignment application of WROC(FM), formerly WSUV(FM), from Sunshine Broadcasting, Inc. ("Sunshine") to WSUV, Inc. ("WSUV"). Assuming arguendo that Miracle has standing to contest the WSUV assignment, we have considered the Application for Review and we deny it for the reasons set forth below.[2]

DISCUSSION

2. On October 18, 1993, Miracle filed a Petition to Deny the assignment application from Sunshine to WSUV for station WROC(FM) in Fort Myers Villas, Florida. In its Petition to Deny, Miracle asserted that Sunshine's assignment application should be denied for the following reasons: (1) the Time Brokerage Agreement between Sunshine and Schefflera, Inc., licensee of WJBX(FM) at Fort Myers Beach, Florida did not comport with Commission rules and evidences a premature transfer of control; (2) Sunshine was in violation of the Commission's main studio rule; and (3) Sunshine's application for assignment was incomplete and defective. The allegations raised by Miracle in its Application for Review are the same as those raised in the Petition to Deny the assignment application. Those arguments were considered and rejected by the Bureau in its decision of March 16, 1994. Letter from Chief, Audio Services Division, (Ref. 1800B3-REO). We agree with the Bureau's analysis there and find no basis to overturn its decision.

3. However, one point warrants further clarification. Miracle claims that the assignment application of WROC(FM) was "incomplete" primarily because it did not contain a copy of a document creating a "first security interest" in certain assets conveyed to secure payment by WSUV for purchase of the station. Our rules do not require the filing of security agreements unless they contain provisions relating to the present or future ownership or control of the licensee or permittee, of the licensee's or permittee's stock, or of rights or interests in the licensee or permittee or its stock. See 47 C.F.R. § 73.3613(b).[3] See also FCC Form 314, page 7

[1]On April 28, 1994, Sunshine Broadcasting, Inc. ("Sunshine") filed a motion for extension of time to oppose the Application for Review; on May 16, 1994, Sunshine filed an additional motion for extension of time to oppose the Application for Review; and on May 20, 1994, Sunshine filed an Opposition to the Application for Review.

[2]Miracle claims it has standing as a shareholder in Sunshine. The issue of its ownership interest in the corporation is currently the subject of civil litigation in the Lee County Circuit Court, Fort Myers, Florida. See Miracle Broadcasting, Inc. and Ronald Gold Bellairs and Sunshine a/k/a Sunny 106.3, Lee County Circuit Case No. 91-8700 CAWCM. That court is the proper forum for resolution of the dispute surrounding Miracle's ownership interest in Sunshine, and we will not consider that private contractual matter here. See, e.g., John F. Runner, 36 RR 2d 773, 778 (1976).

[3]Section 73.3613(b) of the Commission's rules, provides in relevant part: "Contracts, instruments or documents relating to the present or future ownership or control of the licensee or permittee or of the licensee's or permittee's stock, rights or interests therein, or relating to changes in such ownership or control shall include but are not limited to the following: (1) Articles of partnership, association and incorporation, and changes in such instruments: (2)

(Question 15) which inquires as to whether there are any "documents, instruments, contracts or understandings relating to ownership or future ownership rights. . . ." Accordingly, the argument that the application was not complete because it did not attach the security agreement is without merit. However, we emphasize that, because a security agreement may involve potential future ownership and/or control of the station, the staff, in its discretion, may require the filing of such agreements in any transaction where it deems it necessary to examine the actual document prior to granting the application.

4. In any event, in light of the charges in Miracle's petition, the staff requested and received a copy of the security agreement subsequent to the filing of Miracle's Application for Review. Miracle has challenged the authenticity of the security agreement, noting that it is dated March 31, 1993. That date precedes the September 3, 1993 date when WSUV and Sunshine filed the assignment application and the October 21, 1993 date when WSUV submitted a certification in lieu of the security agreement, purportedly because the agreement had not been finalized. See para. 3 supra. Miracle contends that the contradictory date, coupled with other internal inconsistencies in the document, indicate that the security agreement is a "fabrication;" i.e., Miracle charges that "the security agreement submitted to the Commission . . . has nothing whatever to do with the actual security agreement between the parties."

5. Both Sunshine and WSUV filed letters responding to Miracle's concerns and explaining that the incorrect date on the security agreement, as well as the other minor inconsistencies,[4] were due to "scrivener's error." The text of the security agreement supports this position, since certain references in the agreement could not have been included had the document actually been signed on March 31, 1993.[5] Thus we are satisfied that, though the document was not carefully drafted, it is a valid security agreement that represents the parties' understanding concerning the assignment of WROC(FM). With regard to the question of whether the agreement creates an unlawful security interest, we conclude that it does not. Though the document creates a security interest in and pledges the physical assets of the station as security, it does not contain any provisions affecting the ownership or future ownership of the licensee, its stock, or any interest in the licensee or its stock, nor does it pledge the license itself or in any other way violate the Communications Act or the Commission's rules and policies.

CONCLUSION

6. ACCORDINGLY, IT IS ORDERED, that the Application for Review filed on April 15, 1994, by Miracle Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Bylaws, and any instruments effecting changes in such bylaws; (3) Any agreement, document or instrument providing for the assignment of a license or permit, or affecting, directly or indirectly, the ownership or voting rights of the licensee's or permittee's stock . . . ." See also FCC Form 314, page 7 (Question 16), FCC Form 315, page 9 (Questions 15, 16), and Section 73.1150(a) of the Commission's rules, which provides in relevant part: "In transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever."

[4] E.g., transposition of the terms "Secured Party and Debtor" in paragraph 2 of the agreement.

[5] For example, the security agreement specifically states that "Debtor and Secured Party have entered into an agreement dated August 13, 1993."

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Monmouth Cablevision,
Monmouth County, New Jersey
LOI-94-1

Letter of Inquiry - Negative
Option Billing Issue

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1995 Released: August 22, 1995

By the Chief, Cable Services Bureau

I. Introduction

1. In a letter dated October 20, 1993, the Commission received a complaint alleging violations by Monmouth Cablevision ("Monmouth") of Commission regulations governing the provision of cable television service.[1] In response to this complaint, the Commission issued Letter of Inquiry 94-1 ("LOI") to Monmouth on February 22, 1994.[2] The LOI requested Monmouth to provide information concerning compliance with the Communications Act's prohibition on negative option billing.

2. We conclude that Monmouth's conduct with regard to automatically billing its customers for the sale price of a remote control unit which had been previously leased to the customers violated the negative option billing provisions of federal law.

II. Facts

3. Beginning September 1, 1993, the effective date of our rate regulations, Monmouth ceased leasing remote control units to customers of its cable system in Monmouth County, New Jersey. Prior to September 1, Monmouth customers could lease a remote control unit at the monthly rate of $1.00 per unit. After September 1, the bills of subscribers who had been leasing remote control units contained a $5.00 charge denominated "used remote control sale." These bills stated that "[m]onthly charges for remote control units are being eliminated and Monmouth Cablevision is providing customers with the option to purchase the remote control units they currently have in their homes as well as additional new remote control units. Existing remotes will be billed at $5.00 each on our October statement. Customers wishing to assume ownership of their remotes need only pay that charge. Customers who do not wish to purchase their remotes need only return them to have that charge removed. Additional new remotes are available at our customer service locations for just $15.00." Monmouth states, in its response to this LOI, that customers who did not wish to purchase their remote control units could return them by December 15, 1994 and receive a credit to their account. Monmouth also states that the price charged for the purchase of the remotes was derived by taking the depreciated gross book value of all remote control units and apportioning it on a per remote basis.[3]

[1] The Commission received a letter, dated October 20, 1993, from Congressman John D. Dingell, with an attachment from a subscriber to Monmouth Cablevision. The Congressman wrote on behalf of a subscriber to Monmouth Cablevision who had complained about being billed for the purchase of the remote control unit which the subscriber previously leased.

[2] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Monmouth Cablevision, LOI-94-1 (February 22, 1994).

[3] We do not address in this Order the reasonableness of the sale price of the remote control units.

4. Monmouth states that it advertised the sales price of the remote control units and that it would no longer provide or maintain such units in The Asbury Park Press on August 31, 1993; on Monmouth Cable Live!, a cable television show, from August 27, 1993 through October 14, 1993; in cable television messages during September and October, 1993; and in telephone messages played throughout the month of October 1993 when calls to the operator were placed on hold. Customers also received information on this change in leasing policy in an insert with their October, 1993 bills.

III. Background

5. In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress created a process for regulating cable programming and equipment rates. Section 3(f) of the Cable Act adds a new provision to the Communications Act which states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[4] It further specifies that "a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."[5] This prohibited billing practice is commonly referred to as negative option billing.

6. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, (*"Rate Order"*)[6] implementing this Section of the 1992 Cable Act, the Commission explained that the prohibition against negative option billing applies to "additions of a new tier of service or a new single channel service without the affirmative assent of a subscriber."[7] It added, however, that the negative option billing provision does not apply to "a change in the mix of channels in a tier, including additions or deletions of channels . . . unless they change the fundamental nature of the tier" or to rate increases unless the price change is accompanied by a fundamental change in service, such as the addition of a new tier.[8] Further, it stated that restructuring of tiers and equipment will not bring the prohibition into play if the subscribers continue to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service.[9]

7. The Commission rule, with respect to negative option billing states, in relevant part:

> (a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.[10]

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4 Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f).

5 *Id.*

6 8 FCC Rcd 5631 (1993).

7 *Rate Order*, ¶ 440.

8 *Id.*

9 *See Id.* at ¶¶ 440-441 & n. 1105 (the Commission recognized that the 1992 Cable Act did not restrict movement of channels to deregulated status but it doubted that such changes would occur frequently).

10 47 C.F.R. § 76.981(a).

8. With respect to sales of customer equipment, the Commission rule states:

> A cable operator may sell customer premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit.[11]

IV. Discussion

9. The 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." [12] Monmouth asserts that those subscribers who were leasing remote control units had affirmatively requested them. Although we agree that, in a literal sense, this is the same equipment that the customer previously rented, we cannot find that these customers affirmatively requested to purchase these remotes rather than renting them. The issue here is whether changing the way in which existing service and equipment is offered, *i.e.*, from leasing to selling, constitutes a fundamental change of service so as to invoke the prohibition against negative option billing. After careful review, we conclude that Monmouth's act of billing customers for the sales price of the remote control units without their affirmative request violates the negative option billing provisions of the statute and the Commission's rules.

10. Monmouth asserts that the sale of the remote control units was simply part of the company's rate restructuring. It argues that it followed Commission rules on restructuring which do not invoke the negative option billing restrictions unless the restructuring results in a fundamental change in the nature of existing service. However, when and if Monmouth's subscribers requested a remote control unit prior to restructuring, they presumably understood that the unit was company-owned equipment leased to them for use for a monthly fee. The nature of a lease or user's fee and the legal status of being a lessee or user is fundamentally different from a sale and the legal status of being an owner. It is reasonable to assume that the customers who were leasing the remotes never expected that Monmouth would (or could) unilaterally charge them for such a fundamental change in the nature of the service they requested and in their own legal status with respect to the equipment at issue by automatically billing them for the alleged "purchase" of the remotes without their prior consent to such sale. Accordingly, we find that Monmouth violated the negative option billing restriction by automatically billing customers for equipment without their prior consent.

11. This interpretation of Commission rules, we believe, protects the interests of subscribers in not being billed for services or equipment they have not requested or whose nature has been fundamentally changed. Section 3(f) of the 1992 Cable Act seeks to ensure that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired and for which no request has been made. It protects subscribers both from inadvertent payment of such charges and from becoming contractually bound for them. The conclusion we reach here is consistent with this provision and its purposes. To change the way in which the equipment is offered from leasing to selling significantly changes the contractual relationship between Monmouth and its customers. Unlike other cases where we reached a contrary

[11] 47. C.F.R. § 76.923(i); *See also* n. 3, *supra*.

[12] Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f).

result,[13] here we believe that more occurred than simply rearranging the way the same services and equipment were offered. In this case, what consumers unilaterally were billed for (the purchase of a remote) is fundamentally different from what they had previously requested and agreed to (the lease of a remote). In light of this, we conclude that Monmouth, with respect to automatically billing its customers for the purchase price of their remote control units, violated the federal negative option billing restrictions, Section 3(f) of the 1992 Cable Act and our rules.[14]

12. Although we conclude that Monmouth Cablevision violated the negative option billing provisions of the rules and the statute, we find it unnecessary at this time to either seek a monetary forfeiture or to impose other remedial relief. In exercising this discretion, we take into account the *de minimis* difference between the $5.00 purchase price and the total rental price that would be paid over a relatively brief period of time. We also note that Monmouth Cablevision could have achieved the same result by charging the $1.00 rental fee for five months and, thereafter, eliminating the rental option and charge. We are aware, as well, of the large number of regulatory requirements that became effective on Spetember 1, 1993, and the associated compliance difficulties. Monmouth Cablevision should, however, be prepared, in accordance with the statutory provision on negative option billing, to address any remaining disputes with subscribers regarding the purchase requirement so that subscribers not wishing to purchase are not, without their positive consent, required to pay the purchase price.

13. Accordingly, IT IS ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

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[13] *See* Comcast Cablevision, Tallahassee, FL, Letter of Inquiry 93-2, DA 95-61 (January 20, 1995); Warner Cable Communications, Milwaukee, WI, Letter of Inquiry 93-14, DA 95-60 (January 20, 1995); C-Tec Cable Systems, City of McBain and Zeeland Charter Township, MI, Letter of Inquiry 93-1, Comcast Cablevision, Howard County, MD, Letter of Inquiry 93-3, US Cable, Lake Forest and Lake Bluff, IL, Letter of Inquiry 93-13, Multivision Cable TV, Prince Georges County, MD, Letter of Inquiry 93-15, Time Warner Cable, Everett, Somerville and Winthrop, MA, Letter of Inquiry 93-16, Century Southwest Cable TV, Beverly Hills and Los Angeles, CA, Letter of Inquiry 93-17, Comcast Cablevision, Mount Clemens, MI, Letter of Inquiry 93-19, Nashoba Cable Services, Danvers, MA, Letter of Inquiry 93-23, Vision Cable of North Carolina, NC, Letter of Inquiry 93-24, Falcon Cable, Harrisonburg, VA, Letter of Inquiry 94-2, and Warner Cable, Harrisonburg, VA, Letter of Inquiry 94-5, DA 95-106 (January 25, 1995); and Paragon Cable, Irving, TX, Letter of Inquiry 93-25, DA 95-556 (March 21, 1995).

[14] Communications Act of 1934 § 632(f); 47 U.S.C. § 543(f); 47 C.F.R. § 76.981.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. NY1572 (Canaan)

Taconic Technology Corp.

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 22, 1995

By the Chief, Financial Analysis and Compliance Division:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for equipment used to receive the basic service tier, not for CPS. In particular, the record shows that the complainant challenged only the additional remote control charge. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Booth American Company
d/b/a Salem Cable TV

CUID Nos. VA0247 (Roanoke)
VA0048 (Salem)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1995 Released: August 24, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on June 15, 1995.[11]

5. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are equal to or lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's calculations as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) were based on a basic tier rate of $11.28 and a CPS tier of $9.27. However, Operator's rate card indicates that, as of the initial date of regulation, its actual monthly rate for the basic tier was $6.95 and its actual monthly rate for the CPS tier was $13.90. Accordingly, we changed the basic tier rate entered on Form 393, Part II, Worksheet 1, Line 101A from $11.28 to $6.95, and we changed the CPS tier rate on Form 393, Part II, Worksheet 1, Line 101B from $9.27 to $13.90.

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[12] We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

c. The 1992 Cable Act requires operators to unbundle fully equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress' directive by requiring operators to establish an equipment basket which includes "all costs associated with providing customer equipment and installation."[14] In Part III of FCC Form 393, an operator calculates its total customer equipment and installation costs which constitute the equipment basket. Form 393, Part II, Worksheet 3 unbundles these costs from the operator's total permitted regulated revenues in order to establish its maximum service rates.

d. In reporting its capital costs of leased customer equipment on Form 393, Part III, Schedule C, Operator did not include any costs for remotes. Operator's rate cards indicate that as of September 30, 1992 Operator leased remotes to customers for a monthly fee of $4.85, and as of the initial date of regulation it provided remotes at "no fee" per month. Thus, Operator's monthly equipment revenue as of September 30, 1992 on Form 393, Part II, Worksheet 2, Line 204 includes revenue derived from the rental of remotes, but its

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form *393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(c).

unbundling figure on Part II, Worksheet 3, Line 301 does not include any costs associated with remotes. Because Operator calculates its permitted programming rates based on its September 30, 1992 regulated revenues and is not subtracting its costs for remotes from these revenues, Operator is recovering the costs associated with its rental of remotes through its charges for the basic and CPS tiers. Such a result is contrary to the statutory and regulatory unbundling requirement. Under our rules, an operator may choose not to charge customers for premises equipment, but it may not recover its costs associated with customer equipment through its programming rates.[15]

e. Since Operator has not justified its Part III allocations, we must calculate its estimated total annual capital costs for remotes. In doing so, we used the remote charge of $4.85 provided by Operator as the cost of the remote. We assumed, consistent with the filings of similar operators in the area, that the number of remotes in service equalled the number of converters in service, and that Operator's remotes were depreciated according to the same schedule as its converters. Based on these assumptions, we calculated Operator's total annual capital costs for remotes to be $3,675. We therefore increased Operator's annual customer equipment and installation costs on Part III, Step G, Line 32 by $3,675, and made corresponding adjustments to Part III, Step G, Line 34 and Part II, Worksheet 3, Line 301.

6. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Opeator filed.[16] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October, 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rate, of 1.030.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[17] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the franchise areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for

[15] We also note that according to its rate card, Operator offered new and used remotes for sale to subscribers as of the initial date of regulation. This practice creates a potential for Operator to recover its costs associated with remotes twice: first through its charges for rate-regulated services, and again through its sales revenues.

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[18]

10. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
VA0247	11\1\93	10\27\93
VA0048	11\1\93	10\27\93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
VA0247	$13.90	$13.89
VA0048	$13.90	$13.89

[18] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Smith Broadcasters of Santa Barbara Limited Partnership — CSR-3822-A

For Modification of Television Broadcast Station KEYT-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 23, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Smith Broadcasting of Santa Barbara Limited Partnership ["KEYT-TV"], licensee of Station KEYT-TV (ABC, Channel 3), Santa Barbara, California, has filed the captioned petition for special relief that seeking to include the communities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Santa Paula, Simi Valley, Thousand Oaks, and Ventura, California, within the Santa Barbara - Santa Maria - San Luis Obispo, California Area of Dominant Influence.[1] KEYT-TV's petition is opposed by Riklis Broadcasting Corporation ["KADY-TV"], licensee of Station KADY-TV (Ind., Channel 63), Oxnard, California,[2] and by ABC Holding Co., Inc. ["KABC-TV"], licensee of Station KABC-TV (ABC, Channel 7), Los Angeles, California. KEYT-TV filed a consolidated reply.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its *Report and Order* in MM Docket 92-259,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market

[1] KEYT-TV's ADI is the Santa Barbara - Santa Maria - San Luis Obispo, California ADI (#109), which consists of Santa Barbara County and San Luis Obispo County, California. The communities KEYT-TV seeks to include within this ADI are located within Ventura County, California, which is adjacent to Santa Barbara County and is located within the Los Angeles, California ADI (#2). The following system are among those involved and providing service to the communities in question: the Chronicle Publishing Company, d/b/a Ventura County Cablevision providing service to Camarillo, Fillmore, Moorpark, Ojai, Santa Paula, and Thousand Oaks; Comcast Cablevision of Simi Valley providing service to Simi Valley; Century Cable of Northern California providing service to Ventura; Falcon Cable providing service to Thousand Oaks, and Jones Intercable, d/b/a Communication Services providing service to Oxnard. We understand petitioners request as being intended to include the specific communities named as well as the areas receiving service from the systems in the nine specifically named communities.

[2] Jones Intercable, Inc., operator of a cable system serving Oxnard, California, submitted late-filed comments supporting KADY-TV's opposition.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *Broadcast Signal Carriage Issues* , 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership

designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations

have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headed of the system; 3) indemnification may be required for any increase in copyright liability

[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).

[8] 8 FCC Rcd at 2977 (emphasis in original).

[9] *Id.* and n. 139.

[10] 47 C.F.R. §76.59.

resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headed of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

ARGUMENTS OF THE PARTIES

8. In support of its petition, KEYT-TV states that every cable system serving the communities in question has carried KEYT-TV since at least 1987. KEYT-TV further states that its city of license is located in the southernmost portion of the ADI, some 126 miles from its ADI's northern boundary and just 53 miles from Thousand Oaks, the most distant of the communities KEYT-TV seeks to include within its ADI. KEYT-TV acknowledges that, while Thousand Oaks and some of the other communities do lie closer to Los Angeles than to Santa Barbara, the Santa Monica Mountains are situated between Los Angeles and these communities, and, in fact, all of the communities in question are encompassed by KEYT-TV's Grade A or Grade B contours.[12] KEYT-TV contends that it has provided extensive coverage and other local service to the communities in question and to Ventura County as a whole, and notes that the station maintains a live, staffed news bureau in Ventura County, based in Oxnard, covering news, sports, and weather of the communities in question, as well as stories of interest to the communities. In addition, KEYT-TV notes that it sponsors local civic and charitable events, and has donated free time and technical assistance to some of them. KEYT-TV states that many local small businesses that cannot afford to advertise on Los Angeles stations to reach viewers in the communities in question advertise on the station, and KEYT-TV also submits letters in support of its request from the mayors of the communities, as well as from several police and fire chiefs, and the Ventura County Sheriff.

9. KEYT-TV claims that stations licensed to the Los Angeles ADI do not provide significant service to the communities in question. KEYT-TV states that Station KSTV-TV (Channel 57), Ventura broadcasts Spanish-language programming, while KADY-TV (Channel 63), Oxnard airs only "brief local news inserts," rather than a full-length news program, since 1989. Los Angeles licensees, KEYT-TV asserts, do not afford significant coverage to the communities in question, nor do the communities' residents identify with Los Angeles as they do with Santa Barbara. This, claims KEYT-TV, is underscored by a 1987 survey conducted by Frank N. Magid Associates, Inc., excerpts of which the station submits. Finally, argues KEYT-TV, with respect to the fourth factor, county-wide viewership surveys demonstrate "that a significant number of residents of the Communities regularly watch

[11] 8 FCC Rcd at 2981.

[12] KEYT-TV also claims that a 1990 study, which KEYT-TV does not submit, "found that KEYT-TV provided one of the two strongest signals in [Thousand Oaks]." (footnote omitted).

KEYT-TV."[13] KEYT-TV submits its own summaries of this data, and an excerpt from the 1987 Magid study indicating that 25% of Ventura County residents prefer KEYT-TV as a source of local news.

10. In opposition, KADY-TV contends that while KEYT-TV may be carried on cable systems serving the communities in question, the station is subject to network program nonduplication blackouts of most of its programming in most of Ventura County. Contrary to KEYT-TV's assertion, KADY-TV states that "few eastern county viewers can receive KEYT even with a rooftop antenna," nor can it be received at KADY-TV's Oxnard studios in the central coastal portion of the county. In fact, notes KADY-TV, KEYT-TV abandoned a translator on Santa Cruz Island in 1990, which targeted Ventura County. KADY-TV argues that on four days in September 1992, "KEYT averaged fewer than two minutes of original . . . news per day from the communities," and notes that KEYT-TV has only a single news reporter and one photographer to cover all of Ventura County. That Ventura County businesses need KEYT-TV for advertising is not true, maintains KADY-TV, for both it and KSTV-TV as well as area cable systems are available as advertising media. In addition, KADY-TV states that it and Jones Intercable, operator of the Oxnard cable system, are creating a local news operation, the Ventura County News Network, in which other media organizations are expected to participate. In any event, notes KADY-TV, the station does currently provide significant coverage of local events. This is underscored, KADY-TV suggests, by viewership data that shows that in fact KEYT-TV's Ventura County audience has declined between 1988 and 1992, in both prime time and sign-on to sign-off. Jones Intercable, in support of this opposition, urges that it is impossible to tell how many of the news stories KEYT-TV cites in support of its filing relate to Oxnard, that advertising support from Ventura County are irrelevant to the request, that the audience data submitted is old and incomplete, and that KEYT-TV has not carried its burden of proof. Jones Intercable, operator of a cable system in Oxnard, El Rio, Port Hueneme and portions of Ventura County, in its comments in support of KADY's opposition, adds that KEYT-TV's claim that it provides advertising services to businesses in Ventura County "is silly" and that must-carry rights are designated to facilitate viewers access to local programming and not to expand the audience for station's advertising.

11. KABC-TV argues in opposition that KEYT-TV's situation is hardly so unusual as to warrant special relief. Indeed, contends KABC-TV, Ventura County, all of whose cable systems KEYT-TV seeks by its petition to include in its ADI, is an integral part of the Los Angeles area. KABC-TV has been and is carried on all Ventura County cable systems, and enjoys nonduplication rights against KEYT-TV's network programming in many subscribers' homes. KABC-TV notes that it provides Ventura County residents with extensive local news coverage, and that its local news programming attracts more Ventura County viewers than does KEYT-TV's, even during the February 1992 floods. KABC-TV further notes that it involves itself in many educational and public service activities in the communities in question, including providing television decoders to hearing-impaired students, sponsoring a low-cost mammography project, and issuing brochures on parent/child issues in both Spanish and English in conjunction with Ventura County Children's Services. KABC-TV states that it is significantly

[13] KEYT-TV urges that county-wide data be accepted in lieu of community-specific data, as the communities in question "contain most of the population of Ventura County. A National Forest occupies much of the remainder of the County."

viewed in Ventura County while KEYT-TV is not,[14] and that all of the communities in question lie within KABC-TV's Grade B contour, and some are even encompassed by the station's Grade A contour. KABC-TV and the other Los Angeles network affiliates each achieve higher viewership than KEYT-TV in cable households, too, KABC-TV notes. Even area commuting patterns, argues KABC-TV, demonstrates a close alignment between Ventura County and Los Angeles.

12. In reply KEYT-TV argues that it has satisfied the statutory criteria for modification of its ADI, and that KADY-TV's and KABC-TV's oppositions are motivated by the desire to limit the availability of competitive local programming, contrary to the public interest. KEYT-TV states that it simply seeks to ensure that its ADI reflects its "real-world" market. KEYT-TV notes that its local programming is not subject to nonduplication blackouts, and argues that this programming is extensive, outstanding, and desired by community leaders, while that proposed by the Ventura County News Network is speculative. Despite rugged area topography affecting KEYT-TV's signal, as well as others, KEYT-TV asserts that a significant number of area residents watch KEYT-TV, particularly its local news programming, and that its net weekly circulation in Ventura County cable homes has grown from 78,900 households in 1987-88 to 103,000 households in 1991-92. In contrast, contends KEYT-TV, neither KADY-TV nor KABC-TV provide significant service to the communities in question.[15] KEYT-TV further argues that Ventura County commuters still return home each day to local concerns, and that many in any event commute to Santa Barbara as well.

ANALYSIS AND DECISION

13. Ventura County is an area of rugged terrain[16] to the north of the City of Los Angeles where there is an overlap of signals from Los Angeles, the second most populous television market in the country, and the Santa Barbara-Santa Maria-San Luis Obispo market, which is ADI market number 109. Portions of the county are far closer to Santa Barbara than they are to the City of Los Angles or to the other communities in the Los Angeles market to which television stations are licensed. Ojai, for example, is roughly 30 air miles from Santa Barbara, 60 miles from downtown Los Angeles, and almost 110 miles from San Bernardino and Riverside. Nevertheless, the great majority of television viewing in the County is to the stronger and more numerous Los Angeles television stations. Arbitron, as is reflected in the filings in this proceeding, has chosen for survey purposes to divide Ventura County into western and eastern

[14] For a network station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of a least 25%. 47 C.F.R. §76.5(i).

[15] KEYT-TV states, for example, that from January 1, 1993 to May 15, 1993, KEYT-TV covered 211 stories concerning the communities in question while KABC-TV covered 17.

[16] For example, Fillmore is described as "in the Santa Clara River valley surrounded by the Topa Topa and Santa Susana Mountain ranges." Letter from the Mayor of Fillmore attached to KEYT-TV petition. Thousand Oaks is described as "in a valley surrounded by the Santa Monica Mountains." Letter from the Mayor of Thousand Oaks attached to KEYT-TV petition. The Los Angeles market area itself is particularly difficult to describe. According to one description, from the the 1994 *AAA Map of California* (94-11), "Los Angeles basically defies description; its size and diversity make it the great exception to any urban generality one can postulate. Rather than a concentrated center with relatively distinct limits, L.A. is a sprawling and loose union of intermingling communities."

sections, reflecting the associated terrain and viewing patterns in the county. Based on a careful review of the geography and market structures involved and based on the factors set forth in Section 614(h), it appears appropriate and to "better effectuate the purposes of [Section 614]" to follow the audience survey pattern established by Arbitron and grant the request of KEYT-TV insofar as it involves the western portion of the county which includes the communities of Ojai, Oxnard, Santa Paula, Camarillo, and Ventura and deny the request with respect to the eastern portion of the county which includes the communities of Thousand Oaks, Fillmore, Moorpark, and Simi Valley.

14. With regard to factors one and two, KEYT-TV demonstrates, without dispute, that it has a history of carriage on the cable systems serving the communities in question. KEYT-TV also demonstrates that it does in fact provide signal coverage as well as programming service to much of the county, providing at least predicted Grade A or Grade B signal coverage and daily reporting of Ventura County news and events. In addition to these factors, we note that KEYT-TV maintains a news bureau in Oxnard and has received letters of support from local officials who value the service provided by KEYT-TV.

15. With respect to the third factor, we note that opponents have clearly established that other stations eligible for mandatory carriage in the communities in question provide news coverage of issues of concern to the communities, as well as coverage of sporting and other events of community interest. While KEYT-TV questions the quality and substantiality of such coverage, it does not deny that other stations provide coverage. In addition, KABC-TV demonstrates its own significant support of civic and charitable activities in the communities in question. We do not believe, however, that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, because other stations do appear to serve the communities named by KEYT-TV, this enhancement factor would not appear applicable.

16. With regard to the fourth factor -- viewing patterns in the communities in question -- we note that there are significant differences in the evidence based on whether the data in question is from the western or eastern portions of the county. Looked at in terms of the county as a whole, KEYT-TV does not contradict the evidence that it is not significantly viewed in Ventura County, while KABC-TV, a competing ABC station is.[17] Nor can we give credence to KEYT-TV's claim that a 1990 study, that KEYT-TV fails to submit, found the station's signal to be of great strength in Thousand Oaks, in the eastern portion of Ventura County, particularly in the face of 1993-94 viewership data that shows no off-air viewing for KEYT-TV in eastern Ventura County.[18] Nor can we place great weight on KEYT-TV's statement that its net weekly circulation in Ventura County cable homes has grown between 1987-88 and 1991-92, in terms of raw household numbers, given that cable penetration in Ventura County has also grown in that time.

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[17] Reconsideration of the Cable Television Report and Order, 36 FCC 2d 326, 328 app. B (1972).

[18] Arbitron, Television County Coverage: California (Cable Controlled Counties), 1993-1994. KEYT-TV is shown as having no reported audience share or circulation in Ventura East. In Ventura West a 1% share and a 22% net weekly circulation is reported. In cable homes in Ventura East, KEYT-TV is shown as having a 2% audience share and a 27% net weekly circulation. In Ventura West it is reported as having a 6% share and a 50% net weekly circulation.

17. At the same time, however, we do note that Arbitron has evaluated viewership in Ventura County in two parts, Ventura East and Ventura West.[19] This bifurcation of Ventura County for analytical purposes does show a difference in viewing patterns between the two portions. As noted above, no off-air viewership of KEYT-TV is recorded in Ventura County East (including Fillmore, Moorpark, Thousand Oaks, and Simi Valley). In contrast, in Ventura County West (including Camarillo, Ojai, Oxnard, Santa Paula, and Ventura), KEYT-TV achieves, considering the terrain and the competition it faces from the much larger Los Angeles market, at least a modest share and net weekly circulation. KEYT-TV itself submits an analysis, authored by a former employee, which states that "Ventura County is divided socially, culturally and geographically between Eastern Ventura County . . . and Western Ventura County," and that eastern county viewing patterns are oriented toward Los Angeles. Indeed, Arbitron's division of Ventura County does closely reflect the division between those communities that are nearer to Santa Barbara and those that are nearer to Los Angeles.

18. Thus, with respect to the fourth factor, we find that KEYT-TV fails to satisfy this factor with respect to communities in eastern Ventura County. This is particularly significant since KEYT-TV has been in operation as an established affiliate of a major television network for many years. KEYT-TV concedes that eastern county viewers are oriented to Los Angeles, and this is underscored by KABC-TV's evidence of commuting patterns. While KEYT-TV notes the existence of its Ventura County news bureau, this consists of one reporter-photographer team based in Oxnard, in western Ventura County. We note, too, that based on KEYT-TV's own submissions, it covers twice as many news stories from communities in western Ventura County as it does from communities in eastern Ventura County. We cannot find, therefore, that KEYT-TV has justified its request that communities in eastern Ventura County be included in the Santa Barbara-Santa Maria-San Luis Obispo ADI.

19. With resect to western Ventura County, however, it is clear that KEYT-TV garners significant viewership. The western communities lie beyond the 35-mile market zone of Los Angeles (Ventura and Ojai are more than 55 miles from Los Angeles), and appear to be linked more with Santa Barbara than with Los Angeles. Further, we note that the Commission's network program nonduplication rules do not allow the Los Angeles licensees to black out KEYT-TV in western Ventura County communities. KEYT-TV's Ventura County news bureau too, is located in Oxnard. Thus, we find that for western Ventura County KEYT-TV meets the first, second, and fourth factors set forth in the Cable Act. On balance, therefore, with respect to these communities -- Camarillo, Ojai, Oxnard, Santa Paula, and Ventura -- we find that KEYT-TV's request to include these communities in the Santa Barbara-Santa Maria-San Luis Obispo ADI is warranted and, accordingly, for purposes of determining mandatory signal carriage rights, we shall consider these communities to be part of the Santa Barbara-Santa Maria-San Luis Obispo, California ADI with respect to KEYT-TV, as well as within the Los Angeles, California ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, above.

ORDER

20. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That

[19] Id. This data is, clearly, more congruent with community-specific data than was the earlier data submitted by KEYT-TV.

the captioned petition for special relief (CSR-3822-A) filed May 18, 1993 by Smith Broadcasting of Santa Barbara Limited Partnership IS GRANTED to the extent indicated above and in all other respects IS DENIED. This change shall be effective in accordance with the following schedule: KEYT-TV shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The cable systems shall come into compliance with the applicable rules within 60 days of such notification.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

ML Media Partners, L.P. CSR-4282-A
Hermosa Beach, California CSR-4283-A
Manhattan Beach, California
Anaheim, Villa Park, and portions of
unincorporated Orange County, California

For Modification of Television
Broadcast Station KZKI's ADI

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 23, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. ML Media Partners, L.P., trading as MultiVision Cable TV ("Multivision"), operator of cable television systems serving the California communities of Hermosa Beach, Manhattan Beach, Anaheim, Villa Park, and portions of unincorporated Orange County, has filed the captioned petitions seeking the exclusion of these communities from the area of dominant influence ("ADI") of television broadcast station KZKI (Channel 30), San Bernardino, California, for mandatory cable carriage purposes. The licensee of KZKI, Sandino Telecasters, filed a consolidated opposition to these petitions, to which MultiVision submitted a consolidated reply.

BACKGROUND

2. Pursuant to § 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its *Report and Order* in MM Docket 92-259,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> The provisions of (this subsection) reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Commission's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[6]

5. The Commission provided guidance in *MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-

[5] 47 U.S.C. §534(h)(1)(C)(ii).

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

[7] *MM Docket 92-259*, 8 FCC Rcd at 2977.

community basis, rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

MARKET FACTS AND ARGUMENTS OF THE PARTIES

7. Manhattan Beach and Hermosa Beach are both located in Los Angeles County, while Anaheim and Villa Park are both located in Orange County, which is on the southern border of Los Angeles County, which in turn is on the western border of San Bernardino County, where KZKI is located. According to KZKI, all these communities are within its Grade A contour, and all are presently assigned to the Los Angeles, California ADI, as is KZKI.

8. In its petition, MultiVision notes that it has already realigned its program offerings to implement the mandatory carriage rules, and that there are a large number both of commercial and of noncommercial stations entitled to carriage on each of the above systems. According to MultiVision, the needs and interests of San Bernardino are vastly different from those of either the Manhattan Beach/Hermosa Beach or the Anaheim/Villa Park portions of the Los Angeles television market. MultiVision also claims that KZKI broadcasts no local programming directed toward its subscribers, instead it has a home shopping format, as do two cable networks presently carried by these systems, QVCI and QVCII, as well as another must-carry television broadcast station which the above systems already transmit, KHSC (Channel 46), Ontario, California. Furthermore, MultiVision states that its subscribers have indicated no particular demand for KZKI,[10] and MultiVision argues that, since it currently utilizes its systems' maximum technical channel capacity, it should not be forced to delete more popular cable programming, including some which provides local service and coverage to the cable communities and which also offers national news and public affairs coverage, in order to add KZKI. According to MultiVision, there is no evidence that the economic health of local broadcasters in the Los Angeles television market is in jeopardy or requires must-carry protection and forcing MultiVision's systems to transmit KZKI will inhibit the systems' exercise of their First Amendment rights without furthering the goal of increasing programming of truly local interest and concern to MultiVision's subscribers.

9. In response, KZKI notes that it began broadcasting in January 1994, and that it elected must-carry status on MultiVision's systems in the above communities, which are all located in the same ADI as is KZKI's city of license, San Bernardino. Citing the Commission's decision in its *Report and Order* in MM Docket 93-8,[11] KZKI contends that it is entitled to carriage by cable systems serving communities assigned to the Los Angeles ADI, just like any other commercial station in the ADI, and that its services are especially valuable to the elderly, the disabled, those without adequate transportation, and anyone fearful of street crime. According to KZKI, it is not affiliated either with QVC or with HSN, but instead it carries "Shop At Home" programming, which it states is unavailable through other media outlets currently serving the Los Angeles ADI. KZKI adds that, since it has been on the air for less than a year, it is not surprising that there is no great demand for its signal thus far. KZKI notes that it provides viewers with programming such as "Inland Issues," a weekly thirty minute program that focuses on local needs, interests, and problems, as well as "Job Connection," and "San Bernardino's Most Wanted," other regular programming dealing with regional employment and crime. KZKI states that excluding it from the local ADI would disrupt off-air service to local residents. In addition, KZKI claims that MultiVision has not met the four tests prescribed by Congress for ADI waivers, and it notes that, according to the system's program directory

[8] *Id.*, n. 139.

[9] 47 C.F.R. §76.59.

[10] MultiVision notes that when it surveyed 275 of its Manhattan Beach subscribers in May 1994 concerning possible program changes, and they were asked whether or not they would be willing to pay either $1.75 or $1.95 per month in order to view KZKI, only 2% said that they probably would, while 95% said either that they definitely or probably would not.

[11] 8 FCC Rcd 5321, 5327 (1993).

for its Anaheim operation, only nineteen of its 61 useable activated channels are presently transmitting local broadcast stations.[12]

10. In response, MultiVision argues that KZKI fails to meet Commission standards in ADI cases in the following two ways: off-air viewing patterns for the station and historical cable carriage in the communities in contention. MultiVision adds that the fact that KZKI is a new station and that it has a home shopping format should not exempt it from having to meet these standards. MultiVision claims that grant of its petitions will not affect KZKI's position in the Los Angeles ADI, and that it would only affect KZKI's carriage by the five designated MultiVision systems. Although MultiVision recognizes that the above communities are all in the Los Angeles ADI, as is San Bernardino, MultiVision claims that San Bernardino and either Manhattan Beach/Hermosa Beach or Anaheim/Villa Park are each separate and distinct communities with significant differences in social and economic character, as well as in businesses, other interests, location, and residential make-up. According to MultiVision, none of the locally produced programming mentioned by KZKI is targeted to the Manhattan Beach/Hermosa Beach area or to the Anaheim/Villa Park area, and even KZKI has not argued that it needs mandatory carriage in these areas in order to survive or that the economic health of the Los Angeles ADI is in genuine jeopardy. MultiVision concludes, therefore, that mandating carriage of this station by the above systems would be in violation of MultiVision's First Amendment rights.[13]

ANALYSIS AND DECISION

11. Because MultiVision has not provided sufficiently particularized and persuasive evidence that the communities in question are not part of KZKI's market, based on the four statutory or any other relevant factors, its petition must be denied. As a preliminary matter, it needs to be reiterated that the ADI market change process incorporated into the Communications Act is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area involved is warranted. Here the arguments presented by the petitioner are not such as assist in resolving whether a change is appropriate -- whether particular communities should be included or excluded from the market -- but rather appear directed more generally to whether carriage of the signal of KZKI can be avoided because of its program content, regardless of the specific location of the cable communities. In this regard, MultiVision's request is similar to requests previously denied involving the Los Angeles market area.[14]

12. Basically, MultiVision is merely arguing that it is presently carrying other signals, both broadcast and satellite, that have a home shopping format, and that it may have to drop a signal lacking mandatory carriage rights in order to add KZKI.[15] This, however, is insufficient grounds for not complying with the must-carry rule. In fact, the Commission has previously held that home shopping stations provide a valuable and needed service to people lacking the ability or the time to obtain goods outside the home.[16] The fact that two stations share the same format is also not grounds for concluding that their programming is duplicative for purposes of the Commission's must-carry rules. The Commission's standard for what constitutes duplicative

[12] One of the signals presently carried by this system is the other station licensed to San Bernardino, California, Television Broadcast Station KSCI (Channel 18).

[13] *See, Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445, 2472 (1995).

[14] *See, e.g., Community Cablevision Company (CSR-3865-A)*, 10 FCC Rcd 3274 (1995); *Fouce Amusement against Apollo CableVision (CSR-4266-M)*, 10 FCC Rcd 577 (1995); *Fouce Amusement against Falcon Cable TV (CSR-4272-M)*, 10 FCC Rcd 30 (1994); *Fouce Amusement against MultiVision (CSR-4232-M)*, 10 FCC Rcd 977 (1995); *Fouce Amusement against Community Cablevision (CSR-4135-M)*, 10 FCC Rcd 1051 (1995); *Fouce Amusement against Paragon Cable System (CSR-4300-M)*, 10 FCC Rcd 668 (1995).

[15] MultiVision's channel listings for Hermosa/Manhattan Beach, like its listings for Anaheim, indicate that the system presently utilizes only fifteen of its fifty useable activated channels to transmit local television broadcast signals, and that MultiVision is not already carrying the maximum number of signals that it may be required to retransmit on its systems. *See*, § 76.56(b)(2) of the Commission's Rules.

[16] *Report and Order* in MM Docket 93-8, 8 FCC Rcd at 5327.

programming is set forth in Section 76.56(b)(5) of the Rules.[17] We also note that the constitutionality of the must-carry rules has been upheld by a special three-judge panel of the District Court for the District of Columbia.[18] On appeal, the Supreme Court did not issue a stay of the rules but vacated the decision and remanded it back to the District Court for further proceedings.[19] Since this issue is currently being resolved by the Court, no challenge to the constitutionality of these rules is appropriate here, and the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's implementing mandatory carriage provisions.

13. With respect to the market modification request, based on the general geography and structure of the market, it appears at the outset that KZKI is logically part of this ADI market, as are the cable communities in question. Focusing on the specific factors referenced in the statute, we are unable to conclude that any of MultiVision's arguments distinguish these cable communities from the rest of the market. With respect to the question of historical carriage patterns, MultiVision states that it has not historically carried the signal of KZKI. However, since KZKI only began broadcasting in January 1994, it would not have a history of carriage by cable systems serving the above five communities. In any event, we do not agree that the historical carriage factor should, by itself, be given significant weight in these circumstances because such an interpretation of the 1992 Cable Act would, in effect, prevent weaker or newer stations that cable systems had previously declined to carry, from ever being carried. Further, the carriage history here is of little assistance in determining the correct scope of the ADI, because it provides no basis for distinguishing among communities within the ADI.

14. We also find that MultiVision has failed to demonstrate that KZKI does not provide local coverage or service. The fact that KZKI places a Grade A signal over the cable communities where MultiVision's subscribers are located is persuasive evidence that it provides service to these communities. The Commission has noted the importance of signal coverage in determining local service.[20]

15. With regard to the content of KZKI's programming, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[21] Although MultiVision claims that KZKI provides no programming service to the five communities specified, it has submitted no program logs or other tangible evidence to support this claim. Further, we are not in a position to weigh the merits of a particular television station's format when resolving signal carriage complaints or modifying television markets under the special relief process.

16. We also find MultiVision's arguments regarding KZKI's lack of ratings to be unpersuasive. We recognize that home shopping stations, like religious or foreign language stations ("specialty stations"), are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[22] We continue to believe, as the Commission did in its specialty station rules, that the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage. Further, no evidence is before us in this proceeding that would permit us to distinguish these communities from the rest of the communities in the ADI through the use of ratings data.

17. Finally, petitioner has also failed to demonstrate that other stations entitled to assert mandatory carriage rights on the cable systems serving

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[17] *Complaint of Pray, Inc. against Nationwide Communications, Inc.*, 10 FCC Rcd 1053, 1054 (1995).

[18] *Turner Broadcasting System, Inc. v. F.C.C.*, 819 F. Supp. 32 (1993).

[19] *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445 (1995).

[20] *See*, para. 5, *supra*. *See also In Re Applications of PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240, 1243 at para. 13 (1991).

[21] *See*, 8 FCC Rcd at 5327.

[22] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

the noted communities do broadcast news coverage of issues concerning these communities or that they do provide carriage or coverage of sporting and other events of interest in these communities (factor three). We do not believe, in any case, that MultiVision's carriage of other local stations justifies exclusion of its system from the market area. MultiVision has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis KZKI, yet remain in the same market with regard to the station's competitors. We find that MultiVision's petition is inconsistent with Congressional intent, which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must-carry obligations.[23] This is particularly notable in this instance where MultiVision is carrying numerous other television stations from the Los Angeles market, including other stations broadcasting from the same, or almost the same, transmitter site.[24]

ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to § 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and §§ 76.56 and 76.59 of the Commission's Rules, 47 C.F.R. §§ 76.56 and 76.59, That the Petitions for Emergency Special Relief (CSR-4282-A and CSR-4283-A), filed July 19, 1994, by ML Media Partners, L.P trading as MultiVision Cable TV ARE DENIED. KZKI shall notify MultiVision in writing of its carriage and channel position elections (§§76.56,76.57, 76.64(f)) of the Commission's rules within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Its petitions having been denied, MultiVision shall comply with the applicable provisions of § 614 of the Communications Act and with the Commission's associated rules within sixty (60) days of such notification.

19. This action is taken pursuant to authority delegated by § 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[23] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

[24] Congress has indicated that, "[u]nless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Paragon Cable CSR-4255-A
Torrance, El Segundo, Gardena,
Hawthorne, and Lawndale, California

For Modification of Television
Broadcast Station KZKI's ADI

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 23, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Paragon Cable ("Paragon"), operator of cable television systems serving the California communities of Torrance, El Segundo, Gardena, Hawthorne, and Lawndale, filed the captioned petition seeking exclusion of these five cable communities from the area of dominant influence ("ADI") of television broadcast station KZKI (Channel 30), San Bernardino, California for mandatory cable carriage purposes. The licensee of KZKI, Sandino Telecasters, filed an opposition to this petition. Paragon filed a reply, which also contained program/issues reports for the following three stations licensed to Los Angeles, California: KCBS-TV (CBS, Channel 2); KNBC-TV (NBC, Channel 4); and KABC-TV (ABC, Channel 7). In addition, Paragon submitted a "Request For Leave To File Supplement And Supplement To Petition For Special Relief," which included KZKI's issues/program list for the first quarter of 1994.

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 614(h)(1)(C) of the Communications Act of 1934, as amended, specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as --
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about

[5] Section 614(h)(1)(C)(ii) of the Communications Act of 1934, as amended, 47 U.S.C. §534(h)(l)(C)(ii).

[6] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

MARKET FACTS AND PARTIES' ARGUMENTS

7. The five cable communities listed by Paragon are each located in Los Angeles County, California, and all currently assigned to the Los Angeles ADI, as is KZKI, which states that these communities are also within its Grade A contour.

8. Quoting the Commission's decision in its *Report and Order* in MM Docket 93-8,[10] Paragon argues that a principal reason for mandatory broadcast signal carriage by cable systems is the "preservation of local television service and local public interest programming provided by these broadcast stations." Paragon notes that it already carries the other television broadcast station licensed to San Bernardino, KSCI (Ind., Channel 18), which Paragon states broadcasts unique and special foreign language programming that is of interest to Paragon's subscribers, but that it has never carried KZKI, because it has no such programming. Moreover, according to Paragon, each of the five cable communities noted is located more than sixty miles from San Bernardino, and except for two hours each week, the only programming broadcast by KZKI is the shop-at-home type, with no local political, cultural, or news coverage, unlike KSCI which airs ten hours of news weekly and which maintains a news staff of twelve people. Paragon adds that it presently transmits twenty other off-air television broadcast signals on its 62-channel cable systems, many of which do broadcast locally produced newscasts, news specials, and public affairs programs, and that it also transmits seven educational, governmental, and public access channels. Finally, Paragon notes that between February 3 and March 2, 1994, Nielsen Media Research conducted a metered viewing survey in the Los Angeles area, during which KZKI failed to even meet minimum reporting standards. According to Paragon, its situation meets the above four tests provided by Congress for waiver of the ADI provisions.

9. In response, KZKI states that its lack of historic carriage by Paragon is insignificant, because it has only been broadcasting since January 1994. KZKI adds that viewing data from February 1994 also means little, since the station could not reasonably be expected to gain many viewers in one only month. According to KZKI, the fact that other much wealthier established stations assigned to the Los Angeles ADI broadcast more local news and other programs than KZKI does is not very surprising since KZKI cannot yet afford to do so, but it plans to explore the option of adding more local programming to its schedule when it can. KZKI adds that it presently provides viewers with programming such as "Inland Issues," a weekly thirty-minute program that focuses on local needs, interests, and problems, as well as "Job Connection," and "San Bernardino's Most Wanted," two other regular programs dealing with regional employment and crime. In addition, KZKI states that it is not affiliated either

[7] *MM Docket No. 92-259*, 8 FCC Rcd at 2977 (emphasis in original).

[8] *Id* at 2977, n.139. Viewership data cited herein is from Arbitron, *Television County Coverage* reports. This data is county data, rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.

[9] 47 C.F.R. §76.59.

[10] 8 FCC Rcd 5321, 5326 (1993).

with QVC or with HSN, but instead that it carries "Shop At Home" programming, which is unavailable through other media outlets currently serving the Los Angeles ADI. According to KZKI, its services are especially valuable to the elderly, the disabled, those without adequate transportation, and anyone fearful of street crime. KZKI adds that Paragon presently carries its signal on its 100-channel system at Garden Grove, California, and it has promised to add the station to its Anaheim system as soon as it completes its rebuild of the system. Citing the Commission's decision in its *Report and Order* in MM Docket 93-8,[11] KZKI contends that it is entitled to carriage by cable systems serving communities assigned to the Los Angeles ADI, just like any other commercial station in the market and that granting Paragon's requested waiver would only encourage all the other local cable operators to file similar requests. Finally, KZKI maintains that the fact that

Paragon already transmits KSCI simply demonstrates the system's bias against stations with shop-at-home formats.

10. In reply, Paragon maintains the home shopping stations are neither exempt from the Commission's market modification procedures nor from its local programming requirements. According to the Commission's decision in its *Report and Order* in MM Docket 93-8,[12] home shopping stations were to be treated the same as other commercial stations for purposes of mandatory signal carriage and their formats did not preclude them from meeting their responsibilities to address the needs and interests of their communities of license. Paragon argues that KZKI is mistaken when it contends that, because its Grade A signal covers the five designated communities, it "definitely provides" them with local service, and that this makes the distances between these communities, each of which is between eleven and sixteen miles from Los Angeles, and San Bernardino immaterial and irrelevant. Paragon notes that, in fact, El Segundo borders the Los Angeles International Airport and contends that technical coverage cannot compensate for lack of actual program service geared to the individual cable community. According to Paragon, KZKI's weekly programs "Inland Issues" and "Job Search," which alternates with "San Bernardino's Most Wanted," all focus on the Inland Empire, which is located well east of the Los Angeles suburbs in South Bay, where Paragon's cable systems are located. Paragon adds that KZKI commenced broadcast of these three programs in March 1994, months after it began broadcasting, and that except for two half-hour children's programs aired on Saturday morning, KZKI broadcasts nothing but home shopping programs each day, aside from some thirty- or sixty-second national public service announcements. Moreover, as demonstrated by the program logs Paragon submits from other stations currently assigned to the Los Angeles ADI, which are also entitled to mandatory carriage on Paragon's systems, several of these stations are covering issues and events of concern to the above cable communities, including KABC-TV, which broadcasts 24 hours weekly of local news. Paragon adds that KZKI has not challenged the accuracy of its viewing survey, which showed that the station failed to reach minimum reporting standards. Finally, the fact that Paragon has not yet added KZKI to its system demonstrates that grant of the requested market modification will not disrupt its subscribers' established viewing patterns, which Congress has held to be an important consideration in these matters.

ANALYSIS AND DECISION

11. Because Paragon has not provided sufficiently particularized and persuasive evidence that the communities in question are not part of KZKI's market, based on the four statutory or any other relevant factors, its petition must be denied. As a preliminary matter, it needs to be reiterated that the ADI market change process incorporated into the Communications Act is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area involved is warranted. Here the arguments presented by the petitioner are not such as assist in resolving whether a change is appropriate -- whether particular communities should be included or excluded from the market -- but rather appear directed more generally to whether carriage of the signal of KZKI can be avoided because of its program content, regardless of the specific location of

[11] 8 FCC Rcd at 5327.

[12] 8 FCC Rcd at 5329.

the cable communities. In this regard, Paragon's request is similar to requests previously denied involving the Los Angeles market area.[13] In this regard, we note that the petitioner presently carries television station KSCI, which like the subject station is also licensed to the City of San Bernardino. The petitioner maintains that it carries this station because of its more desirable programming. It appears that the petitioner in this instance is attempting to circumvent the must-carry rules based upon the format of the subject station.

12. With respect to the four statutory criteria set out in the 1992 Cable Act, we conclude that the petitioner has failed to meet the burden of proof necessary to obtain a waiver of our rules. Turning to the question of historical carriage patterns, Paragon states that it has not historically carried the signal of KZKI. However, since KZKI only began broadcasting in January 1994, it would not have a history of carriage by cable systems serving the above five communities. In any event, we do not agree that the historical carriage factor should, by itself, be given significant weight in these circumstances because such an interpretation of the 1992 Cable Act would, in effect, prevent weaker or newer stations that cable systems had previously declined to carry, from ever being carried. Further, the carriage history here is of little assistance in determining the correct scope of the ADI, because it provides no basis for distinguishing among communities within the ADI.

13. We also find that Paragon has failed to demonstrate that KZKI does not provide local coverage or service. The fact that KZKI places a Grade A signal over the cable communities where Paragon's subscribers are located is persuasive evidence that it provides service to these communities. The Commission has noted the importance of signal coverage in determining local service.[14] While we recognize that KZKI local programming is limited, it never-the-less buttresses its claim of local service in addition to its grade A coverage. Further, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[15] Further, we are not in a position to weigh the merits of a particular television station's format when resolving signal carriage complaints or modifying television markets under the special relief process.

14. We also find Paragon's arguments regarding KZKI's lack of ratings to be unpersuasive. We recognize that home shopping stations, like religious or foreign language stations ("specialty stations"), are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[16] We continue to believe, as the Commission did in its specialty station rules, that the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage.

15. Finally, with respect to the third factor, we do not believe, in any case, that Paragon's carriage of other local stations justifies exclusion of its system from the market area. Paragon has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis KZKI, yet remain in the same market with regard to the station's competitors. We find that Paragon's petition is inconsistent with Congressional intent, which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must-carry

[13] *See, e.g., Community Cablevision Company (CSR-3865-A)*, 10 FCC Rcd 3274 (1995); *Fouce Amusement against Apollo CableVision (CSR-4266-M)*, 10 FCC Rcd 577 (1995); *Fouce Amusement against Falcon Cable TV (CSR-4272-M)*, 10 FCC Rcd 30 (1994); *Fouce Amusement against MultiVision (CSR-4232-M)*, 10 FCC Rcd 977 (1995); *Fouce Amusement against Community Cablevision (CSR-4135-M)*, 10 FCC Rcd 1051 (1995); *Fouce Amusement against Paragon Cable System (CSR-4300-M)*, 10 FCC Rcd 668 (1995).

[14] *See*, para. 5, *supra*. *See also In Re Applications of PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240, 1243 at para. 13 (1991).

[15] *See*, 8 FCC Rcd at 5327.

[16] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

obligations.[17] This is particularly notable in this instance where Paragon is carrying numerous other television stations from the Los Angeles market, including other stations broadcasting from the same, or almost the same, transmitter site, as well as the same city of license.[18]

ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to § 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and §§ 76.56 and 76.59 of the Commission's Rules, 47 C.F.R. §§ 76.56 and 76.59, That the Petition for Special Relief (CSR-4255-A) filed by Paragon Cable IS DENIED. KZKI shall notify Paragon in writing of its carriage and channel position elections (§§76.56,76.57, 76.64(f)) of the Commission's rules within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Its petition having been denied, Paragon shall comply with the applicable provisions of § 614 of the Communications Act and with the Commission's associated rules within sixty (60) days of such notification.

17. This action is taken pursuant to authority delegated by § 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[17] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

[18] Congress has indicated that, "[u]nless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaints of Costa De Oro Television, Inc.	CSR-4495-M CSR-4505-M CSR-4513-M

Requests for Cable Television Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 23, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Costa De Oro Television, Inc., permittee of station KSTV-TV (Spanish lang. ch. 57), Ventura, CA, ("KSTV-TV"), filed the above captioned must carry complaints against Continental Cablevision ("Continental"), Cencom Cable Television, Inc. d/b/a Charter Communications ("Charter"), and Century Southwest Cable Television, Inc. ("Century")[1], all of which operate cable television systems in Los Angeles County, California (collectively the "cable operators").[2] The operators filed separate oppositions[3] to the must carry complaints to which KSTV-TV filed separate replies. We will consolidate the cases since the factual circumstances are essentially identical in each proceeding.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][4] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[5] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's

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[1] Century Cable of Southern California, Inc., affiliated with Century Southwest Cable Television, Inc., is also a party to the complaint.

[2] The following community units served by Continental are affected by this complaint: CA 0439; CA 0531; CA 0774; CA 0775; CA 0807; CA 0808; CA 0809; CA 0853; CA 0917; CA 0918; CA 0919; CA 0920; CA 0922; CA 0937; CA 0938; CA 0939; CA 1120; CA 1126; CA 1127; CA 1163; CA 1169; CA 1265; CA 1266; CA 1267; CA 1268; CA 1451; and CA 1264.

The following community units served by Charter are affected by this complaint: CA 0132; CA 0136; CA 0183; CA 0259; CA 0668; CA 0725; CA 0826; CA 0871; CA 0872; CA 0875; CA 0876; CA 0899; CA 1010; CA 1059; CA 1093; CA 1116; CA 1119; CA 1136; CA 1197; CA 1361; and CA 1458.

The following community units served by Century are affected by this complaint: CA 0254; CA 0456; CA 0457; CA 0550; CA 0253; CA 0726; and CA 0753.

[3] Charter filed a motion for leave asking the Commission to accept its late-filed opposition. Charter asserts that the complaint was not served on the proper parties and the Commission's notice was not sufficiently descriptive so as to put Charter on notice of the filing of the instant complaint. Charter alternatively argues that the opposition could be treated as an informal objection pursuant to Section 73.3587 of the Commission's rules. KSTV-TV, in its opposition to the motion for leave, asks the Commission to reject Charter's pleading, arguing among other points, that it sent copies of the complaint to the most recent addresses of the operator on file with the Commission and that Charter has been put on proper notice by the Commission's public notice release. Charter filed a reply to the opposition to the motion for leave stating that while the station followed the letter of the law in serving the complaint, it should also have mailed a copy to the person with whom it was discussing carriage opportunities with in Los Angeles. Charter then generates more arguments as to why KSTV-TV should not be afforded mandatory carriage rights on its Los Angeles ADI systems.

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 8 FCC Rcd 2965, 2976-2977 (1993).

market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[6] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county.[7] However, there are certain instances where a station primarily serves an ADI other than the ADI in which the station's county of license happens to be located. This is the basis for the Commission's "home county" exception to the standard ADI designation.[8] In this circumstance, the station may assert signal carriage rights in its county of license and in the ADI assigned to it by Arbitron.

ARGUMENTS OF THE PARTIES

3. KSTV-TV asserts that the cable operators have refused, without any legitimate basis, to carry the signal of the station, despite the requirements of the must carry provisions of the 1992 Cable Act. KSTV-TV explains that it is an authorized full-power UHF television station whose city of license is Ventura, CA, a community located in Ventura County, CA which itself is within the Los Angeles area of dominant influence ("ADI"). The station's programming consists of a Spanish language format serving the Hispanic community. KSTV-TV requested carriage on the cable operators' Los Angeles systems, and recognizing that it did not deliver a good signal to the operators' headends, prepared to use a fiber optic link designed by Pacific Bell to transmit its signal to each principal headend. KSTV-TV states that after a period of negotiations in which it sought to meet all the necessary requirements for carriage, the cable operators refused to carry the station.[9] It then asserts that the instant complaints were filed within 60 days of the operators' rejections.

4. KSTV-TV argues that the cable operators' reasoning for rejecting cable carriage for the station on the systems is "wide of the mark." It notes that the operators all assert that the station "is not entitled to must carry status" on any of the Los Angeles area cable systems. The station argues that this claim is not supported by the terms of the 1992 Cable Act or the Commission's rules. KSTV-TV presents letters from Arbitron which allegedly confirm that the station is located in the Los Angeles ADI as listed in the *1991-1992 Television ADI Market Guide*. KSTV-TV notes that the Arbitron letters also mention that the station chose to be reported in the Santa Barbara-Santa Maria-San Luis Obispo ADI but proffers that it did not write a letter asking to be reported in that ADI nor could it find any like documents in its files. The station adds that even if such a request letter existed, reporting is irrelevant to the must carry responsibilities of the cable systems.

5. KSTV-TV states that the statutory one-third channel capacity limit has not been reached by the cable operators on any of their Los Angeles cable systems. Thus, the operators have an available channel to carry the station's broadcast signal and must do so. KSTV-TV surmises that the cable operators are unwilling to

[6] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's *1991-1992 Television ADI Market Guide*.

[7] For purposes of this calculation, both over-the-air and cable television viewing are included. Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[8] *See* 8 FCC Rcd at 2975; 47 C.F.R. §76.55(e)(3).

[9] Charter responded by letter dated March 9, 1995; Century responded by letter dated March 23, 1995; Continental responded by letter dated March 25, 1995.

replace non-broadcast services, and are in effect, serving as the arbiters of what local commercial stations they wish to carry. According to the station, these "elections" are not
permitted by the Commission. KSTV-TV adds that by refusing to carry its signal, the cable operators are preventing the Spanish speaking community, some 6 million Hispanics in the ADI, from receiving a valuable service. The station asserts that it currently provides locally produced news and public affairs programming to the Hispanic market and has plans on developing a sports package geared to this same group. KSTV-TV argues that without cable carriage, the Hispanic community in Los Angeles will never know of the service it provides. The station concludes it presentation by asking the Commission to impose a forfeiture against each of the operators for failing to accord must carry treatment to it and other qualified broadcast stations.

6. The cable operators generally state that KSTV-TV's complaint should be dismissed or denied because the station is not entitled to carriage on the systems, nor have the operators violated any FCC rules justifying imposition of a forfeiture. Continental and Century first argue that KSTV-TV's must carry complaints are procedurally defective and must be dismissed because they were not filed within the 60 day time limit established in Section 76.7(c)(4)(iii).[10]

7. The cable operators then assert that KSTV-TV is not entitled to carriage under the Commission's rules since the *1991-1992 Television ADI Market Guide* clearly shows the station as being within the Santa Barbara-Santa Maria-San Luis Obispo ADI and does not list the station as being within the Los Angeles ADI. The cable operators generally state that it is their understanding from Arbitron that the letters sent to KSTV-TV were not intended to be given the interpretation advanced by the station. In any event, the cable operators argue that these letters cannot change the "clear" listing in the *1991-1992 Television ADI Market Guide*. The operators further argue that KSTV-TV's assignment to the Los Angeles ADI would make little sense as most residents in Los Angeles cannot receive the station's signal off-the-air. Continental and Charter submit that this is one of those "relatively unusual situations" where a station primarily serves an ADI other than the ADI in which the station's county of license happens to be located. These two operators assert that it is for just this reason the Commission fashioned a "home county" exception to the standard ADI zone. In this case it affords KSTV-TV must carry rights in Ventura County, notwithstanding the disparity in ADI arrangements between KSTV-TV and its home county.

8. The cable operators also argue that there is no dispute that KSTV-TV does not provide a good quality signal to the cable system's headend, although the station claims it will obtain fiber optic facilities necessary to relay the signal from Ventura, which is located across the Santa Monica mountain range, to the operators' principal headends in Los Angeles. The operators add that the must carry regime was not fashioned in such a way that would permit distant stations to construct relay facilities in order to gain

[10] According to Continental, the specific event triggering the complaint period to run was its written denial on January 4, 1995 responding to KSTV-TV's December 6, 1994 must carry request. The pertinent portion of the letter reads as follows: "On behalf of Continental Cablevision's cable television systems in Greater Los Angeles, we have been requested to review your various must carry requests recently received by Continental Cablevision. Continental Cablevision believes that KSTV is assigned to the Santa Barbara television market. Accordingly, KSTV would not be entitled to must carry status on Continental Cablevision' cable television systems operating in Los Angeles County. In the event you believe that KSTV is assigned to the Los Angeles ADI, please provide confirmation from Arbitron to support such contrary conclusion."

As for Century, the specific event triggering the complaint period to run was its written denial on January 5, 1995 responding to KSTV-TV's December 6, 1994 must carry request. The pertinent portion of the letter reads as follows: "Please be advised that Arbitron has confirmed to us that KSTV was licensed to the Santa Barbara-Santa Maria-San Luis Obispo television ADI in 1992-93 and continues to be licensed to that ADI. Our cable systems in Eagle Rock and Van Nuys, California are located within the Los Angeles television ADI and, therefore, KSTV does not have must carry rights in those cable systems."

access to cable systems in other markets. Moreover, Continental and Charter assert that they are not exercising control over their facilities to KSTV-TV's disadvantage, rather, it is the station that is now seeking "a must carry windfall" by gaining access to the operators' subscribers that have never been part of its viewing audience. Century adds that although KSTV-TV provides a lengthy discussion of its programming, it does not demonstrate that any of it is directed toward the Los Angeles market. Finally, the cable operators state that if, in the future, KSTV-TV's ADI is changed by Arbitron from the Santa Barbara ADI to the Los Angeles ADI, they will each submit a market modification request to exclude their cable communities from the station's "alleged" market.[11]

9. In reply, KSTV-TV argues that each of the cable operators' oppositions are procedurally defective because they do not include a detailed affidavit as required under Section 76.7(c)(1). The station adds that even if the pleadings are considered, the factual claims must not be accorded the same weight as the ones it made under oath. As for Continental and Century's late-filed complaint claim, the station argues that the reply letters from these two operators show no evidence that they are in fact denials of KSTV-TV's must carry requests. KSTV-TV adds that if Continental and Century had denied its must carry requests, they should not have allowed the station to undertake efforts preliminary to fiber optic construction.

10. The station also reiterates its belief that it is within the Los Angeles ADI. It re-explains that because Ventura County is within the Los Angeles ADI, and the station is licensed to a community in that County, it must also be within the Los Angeles market. As for Arbitron's reporting of KSTV-TV in the Santa Barbara ADI, the station submits that this listing "is clearly an error on Arbitron's part, and [the station] should not suffer the consequences thereof." With regard to signal quality, the station believes that this is not a cognizable issue because the Commission's rules allow for a station to improve its signal by alternate means, such as through a fiber-optic link. Finally, KSTV-TV asserts that an opposition to a must carry complaint is not the forum to request a market modification, and if the cable operators want to act on their proposals, they can file petitions for special relief and pay the required filing fees.

ANALYSIS AND DECISION

11. We dismiss KSTV-TV's must carry complaints. The essential question presented in this proceeding is whether a station is entitled to carriage in the ADI in which its community of license is physically located or whether is it entitled to carriage in the ADI market to which it has been assigned in the *Arbitron 1991-92 Television ADI Market Guide*. Section 76.55(e) of the Commission's rules provides that:

> (1) a local commercial broadcast television station's market shall be defined as its Area of Dominant influence (ADI) as determined by Arbitron and published in its Television ADI Market Guide or any successor publication . . . .
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> Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the *1991-92 Television ADI Market Guide*, available from the Arbitron Rating Co., 312 Marshall Avenue., Laurel , MD will apply.
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12. KSTV-TV is not entitled to carriage on the cable operators' Los Angeles cable systems because the *1991-1992 Television ADI Market Guide*, the controlling text in market designations, assigned the station to the Santa Barbara-Santa Maria-San Luis Obispo ADI and not to the Los Angeles ADI. KSTV-TV therefore is not a "local station" under the

[11] In their oppositions, each cable operator explains in detail how the station does not satisfy any of the four statutory criteria under Section 614(h) of the 1992 Cable Act.

Commission's definition of the term since it is not within the same television market with respect to the Los Angeles cable systems.[12] The question of whether a station can be physically in one ADI but assigned to another can be definitively resolved by reference to the Commission's *Report and Order* in Docket 92-259[13] in which the rule in question was adopted. In that *Report and Order* the Commission specifically addressed the situation where a station primarily serves an ADI other than the ADI in which the station's county of license happens to be located. The concern had been expressed that stations assigned by Arbitron to an ADI in which they were not physically located could result in such stations not having must-carry status in the very communities to which they had been licensed. Responding to this concern, the Commission adopted the "home county" exception to the standard ADI designation. Under Section 76.55(e)(3), the relevant rule provision, stations are entitled to treat "the county in which a station's community of license is located" as within its market regardless of the ADI to which the station is assigned. If KSTV-TV were correct in its reading of the rules, the "home county" exception would have been completely unnecessary. In the present case, the "home county" provision affords KSTV-TV must carry rights in Ventura County along with the communities located in the Santa Barbara ADI but not in the Los Angeles ADI. This situation parallels the case noted in the *Report and Order* of KNTV, San Jose which is assigned to the Salinas-Monterey ADI, even though its home county of Santa Clara is physically within the geographic boundaries of the San Francisco ADI.[14] A review of the *1991-92 Television ADI Market Guide* shows that Arbitron assigned KSTV-TV to the Santa Barbara-Santa Maria-San Luis Obispo ADI in the very same fashion as it assigned KNTV to the Salinas-Monterey ADI.[15]

13. We also find KSTV-TV's statement that Arbitron mistakenly reported the station in the Santa Barbara ADI to be unsupported since the station is listed by Arbitron as being in the Santa Barbara ADI for *two* consecutive years.[16] KSTV-TV has introduced no evidence showing that Arbitron erred in assigning the station to the Santa Barbara ADI. The issue of which market a station is assigned to, a matter that is of critical importance to the broadcasting community, is not something that would easily be overlooked or ignored. As the *Arbitron 1992-93 Television ADI Market Guide* demonstrates, such an "error" was not corrected. Further, assuming that an error was made, parties are entitled to rely on the *1991-92 Television ADI Market Guide* for determining a station's television market for signal carriage purposes. Section 614(h) of the Communications Act contains a specific mechanism for revising Arbitron ADI assignments where the propriety of a station's television market is called into question.[17] Because we resolve the matter based on

[12] *See* 47 C.F.R. §76.55(c).

[13] 8 FCC Rcd 2965 (1993). *See also Memorandum Opinion and Order* in Docket 92-259, 9 FCC Rcd 6723 (1994).

[14] *See* 8 FCC Rcd at 2975 at n. 108.

[15] KADY-TV, Oxnard, also within Ventura County, has been similarly assigned. At least for some purpose, KADY-TV has clearly chosen to identify itself with the Santa Barbara Market. *See, e.g., Broadcasting & Cable*, July 31, 1995, p. 43 where a KADY Television classified advertisement states "KADY-TV services the Santa Barbara market, including Ventura County, San Luis Obispo, Santa Maria and Santa Barbara, as a United Paramount Network affiliate." Although not revealed in the pleadings in this proceeding, this understanding of the markets involved could be the reason for Arbitron's decision to assign Ventura County stations to the Santa Barbara ADI.

[16] *See Arbitron 1992-93 Television ADI Market Guide*.

[17] We do not address here whether such a revision would be appropriate. However, in another proceeding before the Commission, KSTV-TV has stated that "KSTV-TV and Univision's affiliate, KMEX-TV, Los Angeles do not serve the same communities." *See* Petition for Declaratory Ruling or, In the Alternative, Temporary Waiver of Rule 73.658(a) filed by Univisa, Inc. and Costa De Oro Television, Inc. on August 18, 1993. Although the facilities in question may have changed since the filing of

these decisions, we need not reach the other issues raised by the parties.

ORDERING CLAUSES

14. Accordingly, the complaints filed by Costa De Oro Television Inc. in CSRs 4495-M, 4505-M, and 4513-M ARE DISMISSED.

15. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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that petition, the Commission relied on this separation of KSTV-TV from the Los Angeles market of KMEX-TV and the "limited amount of geographic overlap" in acting on the request. *See Applicability of 47 C.F.R. §73.658(g) to Univisa, Inc.*, 10 FCC Rcd 3754 (1995).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

The Chronicle Publishing Company CSR-4490-A
d/b/a Ventura County Cablevision

For Modification of the ADI Markets of
KRCA(TV), KDOC-TV, and KZKI(TV)

In re:

Complaint of Fouce Amusement
Enterprises, Inc. CSR-4468-M
against Ventura County Cablevision

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1995 Released: August 23, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Fouce Amusement Enterprises ("KRCA"), licensee of television broadcast station KRCA (Channel 62), Riverside, California, has filed the captioned complaint (CSR-4468-M) requesting mandatory carriage of its signal on cable systems operated by The Chronicle Publishing Company, d/b/a Ventura County Cablevision ("Chronicle") serving Agoura, Calabasas, Fillmore, Moorpark, Santa Paula, Thousand Oaks, Westlake Village, and portions of Camarillo, California ("the Communities"). In a separate but related proceeding, Chronicle filed the above-captioned petition (CSR-4490-A) seeking to modify the Los Angeles area of dominant influence (ADI) relative to television broadcast stations KRCA, KDOC-TV (Channel 56), Anaheim, California ("KDOC"), and KZKI (Channel 30), San Bernardino, California ("KZKI"). Specifically, Chronicle requests that each station be excluded from must-carry status on Chronicle's systems serving the communities noted above, as well as the communities of Ojai, Somis, Newbury Park, and Oak Park, California (collectively, "the Ventura County Communities").[1] Oppositions and replies to both pleadings have been filed.[2] These issues will be dealt with together because the proceedings are related. We turn first to Chronicle's request seeking to modify the Los Angeles area of dominant influence (ADI) and then address KRCA's carriage complaint.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience

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[1] Chronicle operates three cable systems which are primarily located in Ventura County: the Camarillo system, the Ojai system, and the Thousand Oaks system. Although most of the communities at issue are located within Ventura County, the communities of Agoura Hills, Calabasas, Oak Park, and part of Westlake Village fall within Los Angeles County, adjacent to the Ventura County line.

[2] Chronicle filed a response to the complaint (CSR-4468-M) on March 13, 1995, to which KRCA replied on March 29, 1995. KZKI filed an opposition to Chronicle's petition for special relief (CSR-4490-A) on April 12, 1995. KRCA and KDOC filed oppositions to Chronicle's petition on April 13, 1995. A reply to the oppositions was filed by Chronicle on April 26, 1995. Finally, on May 9, 1995, KRCA filed a "Motion for Leave to File Further Response" and a "Further Response" to Chronicle's reply. An opposition to KRCA's "Motion for Leave" and a motion to strike the "Further Response" was filed by Chronicle on May 24, 1995. Pursuant to §76.7 of the Commission's Rules, however, the pleading period for this proceeding ended upon the filing of Chronicle's April 26 reply. Therefore, we will not formally consider KRCA's May filings or Chronicle's responses thereto.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] 8 FCC Rcd 2965, 2976-2977 (1993).

research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
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> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

of a particular station's market.[7]

5. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND ADI ARGUMENTS

8. The communities here in question are all in Ventura and Los Angeles Counties, California which are located within the Los Angeles ADI. KRCA is

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[8] 8 FCC Rcd at 2977 (emphasis in original).

[9] *Id.* and n. 139.

[10] 47 C.F.R. §76.59.

[11] 8 FCC Rcd at 2981.

a commercial television station licensed to Riverside, California, while KDOC and KZKI are licensed to Anaheim and San Bernardino, California, respectively. Each station at issue is assigned to the Los Angeles ADI. Ventura County is on the California coast on the northern edge of the ADI.

9. In its petition, Chronicle states that the television markets of KRCA, KZKI, and KDOC should be modified for must-carry purposes. Specifically, Chronicle argues that application of the four factors enumerated in 47 U.S.C. §534(h)(1)(C)(ii) justifies its request to exclude the Ventura County Communities from each television station's market. In support of its petition, Chronicle first notes that none of the stations have been historically carried on Chronicle's systems serving the communities at issue. Chronicle then states that while its systems carry a multitude of other stations which provide extensive coverage of local issues and events,[12] the stations at issue do not provide local coverage or other local service to the Ventura County Communities. In fact, Chronicle argues that the communities appear to be outside of both the Grade A and Grade B contours of each of the three relevant stations.[13] Finally, Chronicle points out that the viewership ratings for each station were unobtainable, and, presumably, are not likely to show up on any ratings report because: (1) the Grade B contours for each station do not appear to cover any of the communities served by Chronicle; and (2) there is no history of carriage.

10. In its opposition, KRCA begins by noting that Chronicle has denied carriage of KRCA, despite the fact that it has carried many other Los Angeles market stations, including KSCI which is located at least as far, if not farther, from the communities which Chronicle serves. KRCA also notes that it serves the Asian communities of the Los Angeles area by broadcasting programs in Korean, Mandarin, Vietnamese, and Tagalog. According to KRCA, many potential KRCA viewers reside in Chronicle's communities. In fact, KRCA points to the 1994 Census report which indicates that there are more than 34,500 persons of Asian decent in Ventura County.[14] Next, with respect to historic carriage, KRCA argues that Chronicle addresses only half of the statutory test. Specifically, KRCA states that it is clear that the Act requires consideration of not only the historic carriage of a television station, but also whether *other* stations located in the same area have been carried. KRCA notes that Chronicle carries twelve Los Angeles market stations, including two licensed to Ventura County, and one from the next adjacent ADI (Santa Barbara- Santa Maria- San Luis Obispo, located west of Ventura County). Moreover, Chronicle has carried other foreign language stations located in the same area as KRCA. For instance, Chronicle has carried television broadcast station KSCI (Channel 18), San Bernardino, California, an Asian language station, from at least 1990 through May 1993. KSCI broadcasts from the same tower location as KRCA, and is situated at least as far, if not farther, from Chronicle's communities than Riverside (*i.e.*, KRCA's city of license). KRCA states that Chronicle also carries television broadcast station KVEA (Channel 52), Corona, California, which is contiguous to Riverside.

11. This carriage pattern of Los Angeles market stations, argues KRCA, satisfies the first statutory criterion. KRCA adds that although it has been broadcasting since 1988, it was originally a home shopping station and only began broadcasting its current format of Asian-language and other programming in mid-

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[12] Chronicle notes that local coverage is provided by KEYT-TV (ABC, Channel 3), Santa Barbara, California; KSTV (Ind., Channel 57), Ventura, California; and KADY-TV (Ind., Channel 63, Oxnard, California. Additionally, Chronicle's systems carry the three network stations from Los Angeles (KCBS, KNBC, and KABC), the Los Angeles Fox affiliate (KTTV), two Los Angeles educational stations (KCET and KLCS), and four other Los Angeles independent stations (KTLA, KCAL, KCOP, and KVEA)—two of which (KSTV and KVEA) are Spanish-language stations. Chronicle further notes that its systems carry a wide variety of non-broadcast cable programming as well.

[13] Chronicle notes that its systems serving the captioned communities are located in southern Ventura County and along the western edge of Los Angeles County; the Grade B contours of each station lie north and east of Chronicle's systems. Chronicle then notes that, although signal quality at the headend antennas located in the Santa Monica Mountains is not relevant for market modification purposes, KRCA delivers no signal to the Ojai and Camarillo headends and KDOC delivers no signal to the Ojai headend.

[14] According to 1990 Census, Ventura County has a total population of approximately 655,317 residents. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population Characteristics, California, 1990 CPH-1-6 Appendix B at B-8.

1993. Thus, the issue of whether KRCA was carried when it presented an entirely different programming service provides no indication of whether it should be considered as serving Ventura County today. With respect to local coverage, KRCA argues that contrary to Chronicle's assertion, the Ventura County Communities lie within KRCA's predicted Grade B contour. In addition, the Santa Monica Mountains which, according to Chronicle, create a significant terrain barrier between KRCA and its communities, create the same terrain barrier for the other Los Angeles market stations it has chosen to carry. Moreover, KRCA argues that the fact that mountainous terrain makes over-the-air reception difficult for all Los Angeles market stations cannot justify Chronicle's discriminatory unilateral refusal to carry KRCA. KRCA claims that Chronicle obviously positioned its headend in the Santa Monica Mountains so that it could obtain all of the Los Angeles market stations for its subscribers; therefore, it should be required to carry all of those stations-including KRCA. KRCA then states that it provides programming service to those Chronicle subscribers who are Asian-American and others throughout the Los Angeles ADI who share their heritage.

12. As for the third statutory factor, KRCA states that Chronicle seems to suggest that it should not be expected to carry KRCA due to its carriage of a multitude of other local broadcast stations. KRCA argues that the Cable Act permits the Commission to consider whether local coverage is absent in a community, and whether the addition of a station providing local coverage would be beneficial. However, nowhere in the Cable Act has the Commission suggested that "too much" local programming is a basis for excluding stations that provide local coverage. KRCA then argues that Chronicle emphasizes its carriage of Spanish foreign-language stations, as if serving members of its Hispanic community absolves it from any carriage obligations to its Asian-language subscribers. Furthermore, while Chronicle carried KSCI as recently as 1993, KRCA notes that it does not presently carry any local Asian-language broadcast stations. Thus, given the size of the Asian-American population within Chronicle's communities, KRCA argues that Chronicle is clearly not serving this segment of its subscribership. Finally, with regard to the fourth statutory factor, KRCA states that Chronicle failed to satisfy its burden because it did not provide any evidence of local viewing. Nevertheless, KRCA argues that the Commission has held that reliance on viewership data is inappropriate for foreign language stations such as KRCA.

13. In its opposition, KDOC argues that its station is entitled to assert mandatory carriage rights on Chronicle's systems because both KDOC's city of license (Anaheim) and Chronicle's systems are within the Los Angeles ADI. With respect to the first factor, KDOC concedes that its station has never been carried on Chronicle's systems; however, KDOC argues that the Commission has consistently taken the position that where a cable system seeks to delete a station from a relevant ADI, the fact that a station has not been historically carried on that cable system is of little or no importance. KDOC states that the second statutory factor is satisfied because it currently broadcasts programs which are generally responsive to the problems, needs and interests of Ventura County and Chronicle's subscribers therein. For instance, KDOC: (1) addresses all types of contemporary teen-age problems and issues on its "Teen Talk" program; (2) broadcasts a locally produced public affairs program which covers such issues as auto insurance, wills, self-defense, health, earthquake preparedness, AIDS, alcohol and drug issues, and teen pregnancy; (3) broadcasts a locally produced and award winning educational children's show on Saturday afternoons; (4) airs live prime time horse racing that is shown at least five days a week; and (5) provides Japanese programming and news everyday of the week.[15] KDOC states that the balance of its weekly programming is comprised of syndicated programming, having exclusive rights for some shows in the Los Angeles ADI.[16] KDOC further states that although the communities in question are outside of its Grade B contour, Chronicle concedes that the KDOC signal is received at its systems headends with the single exception of the Ojai headend. KDOC adds that Chronicle carries the signals of the major network stations in Los Angeles

[15] KDOC notes that, according to 1990 Census, approximately five percent of the population of Ventura County is Asian, of which a substantial portion is comprised of Japanese.

[16] According to KDOC, its station has the exclusive right to broadcast the following syndicated programs in the Los Angeles ADI: "Hill Street Blues," "Barnaby Jones," "The Rifleman," "The Wild, Wild West," "Hogan's Heroes," "Bonanza," "Combat," "Black Sheep Squadron," and "Newhart."

as well as the signals of KVEA (Channel 52), Corona, California. According to KDOC, Corona is located approximately 20 miles northeast of Anaheim and is that much further away from Chronicle's systems than is Anaheim. Furthermore, KDOC argues that the failure of Chronicle's systems to carry its signal puts it at a disadvantage *vis-a-vis* the other stations in the Los Angeles ADI since it must bid against the other Los Angeles ADI stations for its programming. With respect to the third criterion, KDOC argues it is not dispositive that other ADI licensees provide coverage and service to the communities in question. Although Chronicle's current programming is responsive to the needs and interests of the communities at issue, KDOC argues that the Commission has stated that coverage by other qualified stations is not intended to serve as a bar to another station's must-carry rights; rather, this criterion was intended to enhance a station's claim for must-carry rights where it could be shown that other stations do not serve the cable communities at issue.

14. Finally, KDOC states that its viewing patterns do not appear on any rating reports for cable households in the relevant communities because Chronicle is not carrying KDOC on its systems. With respect to non-cable households, KDOC claims that it is at a disadvantage *vis-a-vis* the other Los Angeles ADI stations because its transmitter is located at a secondary antenna farm site on Sunset Ridge, while the primary site for most stations in the Los Angeles ADI is at Mount Wilson, some 22 miles northwest of Sunset Ridge. According to KDOC, the UHF spacing requirements delineated in §§73.610 and 73.698 of the Commission's Rules prevent KDOC from locating its transmitter site at Mount Wilson. As a result, there are terrain and antenna bearing problems for off-air reception of KDOC in portions of the Los Angeles ADI. KDOC concludes that Chronicle provides no evidence suggesting that requiring carriage would be disruptive particularly since it receives numerous inquiries from Ventura County residents regarding KDOC's availability.

15. KZKI, in opposition to Chronicle's petition, argues that it is entitled to mandatory carriage on Chronicle's systems because San Bernardino, its community of license, and the cable communities at issue, lie within the Los Angeles ADI. KZKI notes that on December 17, 1993, it elected must-carry status on Chronicle's systems, but the operator rejected the request because carriage would result in increased copyright liability. KZKI states that it renewed its request for carriage after passage of the 1994 amendments to the Satellite Home Viewer Act which cured its copyright problem, but its plea was again rejected by the operator. On January 7, 1994, KZKI states that it commenced service devoting half of its broadcast time to home shopping programming. KZKI claims that, while it is not an affiliate of HSN or QVC, it broadcasts "Shop At Home" programming, a shopping format that is not available through any other media outlet in the greater Los Angeles area. KZKI argues that in the *Home Shopping Order*,[17] the Commission determined that home shopping stations, such as KZKI, provide viewers with an important service and are entitled to mandatory carriage rights under the 1992 Cable Act.

16. KZKI further argues that the four statutory factors for evaluating an ADI modification request indicate that the station is in fact "local" to the cable communities at issue and is appropriately accorded must-carry rights. First, KZKI states that it has not historically been carried on Chronicle's systems because it is a new station signing on-the-air on January 7, 1994. KZKI then states that while historical carriage may be probative of a station's market where the operator and broadcaster have both been in existence for a meaningful period of time, here, the factor is of no consequence. KZKI adds that Chronicle carries the signal of another local San Bernardino station, KSCI, which indicates that the service provided by existing broadcasters licensed to San Bernardino is of interest and value to residents in the communities at issue. Second, contrary to Chronicle's assertions, KZKI claims that it provides local coverage and service to the communities at issue. As noted above, KZKI argues that it is the only provider of the "Shop at Home" format in the greater Los Angeles area, and that the Commission has found that home shopping stations provide an important service to the elderly, disabled, and others confined to their homes for one reason or another. KZKI further argues that although KZKI is a new independent station, it has successfully begun the broadcast of programming specifically targeted toward issues of local interest to southern California viewers.[18]

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[17] *Report and Order in MM Docket 93-8*, 8 FCC Rcd 5321 (1993).

[18] According to KZKI, such programming includes "Inland Issues," a thirty minute weekly program that focuses on current local problems, needs, and interests. In addition,

KZKI also states that its programs likely provide service of interest and value to certain viewers in the communities at issue given the fact that the greater Los Angeles area is an area where many residents commute large distances between cities on a daily basis. Third, KZKI states that Chronicle inaccurately contends that all of the communities are outside of its Grade B contour. According to KZKI, its Grade B contour covers most of Los Angeles County, encompassing the community of Calabesas and the far eastern portion of Ventura County. Nevertheless, KZKI states that Grade B coverage is only one method of demonstrating service to the local community and is by no means conclusive. With respect to the fourth factor, KZKI argues that Chronicle provides no evidence of the viewing patterns of KZKI in cable and non-cable households within the communities at issue. KZKI adds that this factor is not probative of its actual market as KZKI has not been on the air for a significant period of time.

17. In its reply, Chronicle argues that all of the market modification factors specified in the 1992 Cable Act support its request to exclude the relevant communities from the television markets of KRCA, KDOC, and KZKI (collectively, "the Opposers"). Specifically, Chronicle argues that in addition to the absence of historical carriage, none of the Opposers provide coverage or other local service to the captioned communities. Chronicle states that while KRCA and KZKI both *claim* that their predicted Grade B contours cover a small portion of the relevant area, none of the three stations provide even an acceptable Grade B signal to any of the captioned communities. As support, Chronicle points to the results of a signal strength field survey conducted on March 30 and 31, 1995 at 21 test points throughout the captioned communities. According to Chronicle, the survey conclusively demonstrates that none of the three stations come close to providing an acceptable Grade B signal (*i.e.*, -45 dBm). Chronicle adds that the emphasis placed on its carriage of Los Angeles stations KVEA and KSCI[19] is misplaced because KVEA and the other Los Angeles stations carried by Chronicle have a much greater signal strength that reaches well into Ventura County. Chronicle further comments that although KVEA's transmitter may be as far or farther from the captioned communities than those of the Opposers, its Grade B contour clearly covers much of Ventura County and all of the communities served by Chronicle.

18. Next, Chronicle states that each station makes a "patently disingenuous" claim that its programming is somehow of unique interest to Chronicle's subscribers. As for KRCA's statement that its Asian language programming would fill a void for Chronicle's Asian-American population, Chronicle argues that Asian-Americans represent only 5% of the 670,000 persons residing in Ventura County. Moreover, the same U.S. Census cited by KRCA also reports that only 3,095 persons of Asian or Pacific descent in Ventura County speak English "not well" or "not at all." Thus, Chronicle believes that because this represents only 4/10 of 1% of the population of Ventura County, the vast majority of Asian-Americans living in Ventura County speak English. Chronicle adds that even more significant than the small number of persons within the captioned communities who actually speak an Asian or Pacific Island language at home is the fact that these persons are already adequately served by appropriate foreign language programming. Specifically, Chronicle states that it carries the International Channel which broadcasts Armenian, Chinese, Tagalog, Vietnamese, Korean and Farsi language programming. Similarly, Chronicle states that KZKI's shop-at-home programming is already provided to its subscribers through carriage of QVC as well as other paid programming on numerous channels. Chronicle contends that although its subscribers are not lacking for any home shopping programming, this type of programming is not representative of the localism Congress was concerned about in enacting must-carry legislation. Chronicle then states that KDOC's claim that it has exclusive rights to such syndicated programming as "Black Sheep Squadron" and "The Rifleman" is also not what Congress had in mind in establishing statutory factor III, which refers to "news coverage of issues of concern to the community" and "coverage of sporting and other events of interest to the community." Finally, with respect to the fourth factor, Chronicle refers to the May

KZKI broadcasts (on alternative weeks) "Job Connection" and San Bernardino's "Most Wanted," each thirty minute programs which deal with employment and crime issues in the region.

[19] Chronicle notes that KSCI is no longer carried on its systems serving the Ventura County Communities.

1994 Nielsen study[20] for the entire city of Los Angeles which demonstrates that KDOC has only a .2 rating; KRCA and KZKI, however, are not reported. Chronicle argues that while the Opposers stress Chronicle's failure in providing audience data for each station, none of the stations provide data to show that there *is* any viewership of their respective stations within the captioned communities. In light of this information, Chronicle states that the recently obtained Nielsen data conclusively confirms its previous contention that there is no viewership of the Opposers' stations in the areas served by Chronicle.

DISCUSSION

19. Chronicle's request will be granted insofar as it involves the systems in Ojai and Camarillo serving the communities of Ojai, Camarillo, Santa Paula and Somis, all of which are located in the western portion of Ventura County. It will be denied insofar as it involves the system in Thousand Oaks serving the communities of Thousand Oaks, Fillmore, Newbury Park, Moorpark, Agoura Hills, Calabasas, Westlake, and Oak Park, which lie within the eastern portion of Ventura County or in Los Angeles County. In a separate proceeding involving the same geographic area, the communities in the western portion of Ventura County have been found to be logically included within the Santa Barbara - Santa Maria - San Luis Obispo market.[21] As was noted in that proceeding, because the rugged terrain in the area strongly influences viewing and market patterns, Arbitron has divided Ventura County into western and eastern portions for audience survey purposes. Therefore, consistent with the decision in *Smith Broadcasters of Santa Barbara* (CSR-3822-A) and based on our review of the data provided in this proceeding, the general geography, television reception, and viewing patterns, we conclude that this result will, in accordance with the requirement of Section 614(h), "better effectuate the purposes" of the must carry requirements.

20. Petitioner, focusing on the four factors specifically referenced in the statute (paragraph 5 above), presses the argument that the stations in question are not entitled to carriage for the following reasons: 1) they have not been carried historically; 2) they have no audience in the communities; 3) they provide no over-the-air coverage of the area; 4) they provide no programming specifically for the communities; and 5) the communities receive service from and the systems carry the signals of other stations that do provide coverage of issues of concern to the communities. Because to some extent the exclusionary factors pointed to by petitioner apply throughout the entire Los Angles ADI, their application in the manner suggested generally does not help to identify the shape of the market for the stations at hand. These factors are of relevance as a means to distinguish among communities within a market -- to define the boundaries of the market -- not to excuse specific cable systems from compliance with the rules.

21. While the information submitted relating to these factors provides some guidance as to the markets of the stations in question it does not sweep as broadly as petitioner argues. For example, with regard to the first statutory criterion, which deals with historic carriage on cable systems, we note that the 1992 Cable Act was adopted in part to cure past discriminatory signal carriage practices. While none of the stations at issue have a history of carriage on Chronicle's systems, this factor should not be given great weight, because to do so would tend to defeat the underlying purposes of the carriage requirements, unless carriage patterns for the stations in question and for those similarly situated serve to delineate the shape of the market.[22]

22. With respect to the fourth statutory factor, relating to viewing patterns, we also find Chronicle's arguments regarding KDOC's, KRCA's, and KZKI's lack of ratings not to be determinative. Given the terrain and heavily cabled nature of Ventura County, these arguments share essentially the same problems associated with the historic carriage factor. We note that the Arbitron survey data indicates that some 80-90 percent of viewers in the county are connected to cable

[20] Chronicle notes that while the May 1994 ratings are the most recent ratings which it could obtain, the Opposers might have access to more recent ratings and have chosen not to submit them to the Commission.

[21] *Smith Broadcasters of Santa Barbara* (CSR-3822-A), DA 95-1825, (Adopted August 15, 1995).

[22] KZKI only commenced operation on January 7, 1994; thus, historic carriage cannot measure its logical market area.

service.[23] Thus, viewership is difficult to separate from historic cable carriage. As with historic carriage, the fourth factor is useful when it serves to discriminate among communities in order to determine which are within and which are outside of a market. Here, Chronicle has itself suggested that the stations in question lack significant audiences *throughout the entire Los Angeles market area*, rendering the data supplied not useful with respect to specific community determinations. Nevertheless, we are not persuaded that these stations fail to provide the communities with local coverage and service. We note that KRCA and KZKI broadcast home shopping and Asian language programming, respectively. The Commission has previously recognized that stations, once classified as specialty stations (*i.e.*, religious and non-English language), are capable of "offer[ing] a desirable diversity of programming. . . ," yet typically attract limited audiences.[24] We continue to believe that the fact that specialty stations attract smaller audiences must be taken into account in determining the equities concerning such station's rights to cable carriage. Home shopping stations, which also have limited audiences for like reasons, warrant analogous treatment and consideration. And as the Commission has stated in the *Home Shopping Order*, home shopping stations, such as KZKI, provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a traditional manner.[25] As for KRCA, Chronicle's arguments that the vast majority of Asian-Americans residing in Ventura County speak English and that its systems already carry a non-English language station, are not convincing evidence of an absence of service. We believe that KRCA would provide programs of interest to those Asian-American subscribers residing in the communities at issue.

23. With regard to the third statutory factor, we note that there are other stations carried on Chronicle's systems serving the communities at issue which Chronicle claims provide sufficient coverage of local issues and events of concern. However, we have viewed factor III as an enhancement criterion where a station could show that it provides a service that other local stations do not. Because other stations do appear to serve the cable communities at issue, this enhancement factor would simply not appear to be applicable. It is noteworthy, however, that in the western portion of the county, there are television stations, such as KETY and KADY, licensed within Ventura County, which have a closer nexus to the cable communities in that they provide more focused local programming than KDOC, KRCA, and KZKI.

24. It is the second factor, relating to local service and coverage, in combination with the distances involved and an analysis of the terrain that persuades us that there is a basis for distinguishing those communities in western Ventura County from the rest of the Los Angeles market.[26] While parts of the Thousand Oaks system are within the predicted Grade B contours of KDOC, KRCA, and KZKI, the Grade B contours of the stations do not come close to the Ojai and Camarillo system communities. In the absence of evidence to the contrary, predicted Grade B service has been used by the Commission as an indication of service and coverage.[27]

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[23] Arbitron, *Television County Coverage: California* (Standard/Fringe), 1993. Ventura East is shown as having 89% cable penetration and Ventura West 83%.

[24] *See First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[25] *Home Shopping Report and Order*, 8 FCC Rcd at 5327.

[26] Although stations are licensed to a number of communities in the Los Angeles market outside of Ventura County, including Los Angeles, Anaheim, San Bernardino, Riverside, Santa Anna, and Corona, there are essentially two transmitter sites involved; Mount Wilson and Sunset Ridge. All of the VHF stations in the market as well as a number of UHF stations are on Mount Wilson, which is roughly 40 miles from the Thousand Oaks portion of the Ventura County Communities. All of the Los Angeles area stations carried on the Chronicle systems transmit from Mount Wilson. The other stations, including all three stations involved in this proceeding, have their transmitters at the Sunset Ridge antenna site, which is approximately 22 miles more distant or about 63 miles from the Thousand Oaks cable communities.

[27] The Commission has held that the local service requirement may be satisfied if the station's Grade B contour covers the community. *See* 8 FCC Rcd at 2981. The predicted contours of KCRA and KZKI extend further into the County than that of KDOC, but each predicted contour appears to cover at least some of the communities in question. Chronicle has attempted to demonstrate, using measurement data from several of the cable communities, that actual as opposed to predicted service is not available. Although this

Indeed it is asserted, and not disputed, that the signals of KDOC, KRCA, and KZKI are unavailable over-the-air at each headend. Thousand Oaks, being some 65 miles from the transmitter sites of KDOC, KRCA, and KZKI, would be on the fringe of the reception area of these stations in more satisfactory reception conditions. Ojai and Camarillo, however, are some 10-20 miles more distant across mountainous terrain. Further, Ojai and Camarillo are not only across the Santa Monica mountains from Los Angeles, but they are, at some points, 100 miles from both Anaheim and Riverside, the stations' communities of license, and the Los Angeles metropolitan area.

25. As indicated above, in *Smith Broadcasters of Santa Barbara* (CSR-3822-A) a market modification request was made by Smith Broadcasters of Santa Barbara Limited Partnership, licensee of KEYT-TV (ABC, channel 3), Santa Barbara, California. In that case, KEYT-TV filed a petition seeking to include the communities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Santa Paula, Simi Valley, Thousand Oaks, and Ventura, California, within the Santa Barbara-Santa Maria-San Luis Obispo, California ADI. These communities are all located in Ventura County. Based on a review of the geography and market structures involved as well as the factors set forth in §614(h), the request of KEYT-TV was granted insofar as it involves the western portion of the county, which includes the communities of Ojai, Oxnard, Santa Paula, Camarillo, and Ventura. KETY-TV's request was denied with respect to the eastern portion of the county, which includes the communities of Thousand Oaks, Fillmore, Moorpark, and Simi Valley. Important to the decision was our recognition that Arbitron, in its *1991-1992 Television ADI Market Guide*, divided Ventura County into a western portion and an eastern portion for audience reporting purposes. The two sides of the County have different viewing patterns, with the eastern portion particularly exhibiting viewership of stations in the Los Angeles ADI, and the western portion reflecting an audience which aligns itself more with Santa Barbara ADI stations. The assignment of the communities in that case attempted to replicate the market realities as reflected by Arbitron. For practical purposes, the grant of the request effectively adds the former communities to the Santa Barbara ADI, so that KEYT-TV may assert signal carriage rights on the cable systems serving those communities. However, KEYT-TV continues to be a distant station with respect to the cable systems serving the latter communities.

26. Applying the same rationale for the market dichotomy used in that case to the present case, we find that those cable systems serving eastern Ventura County, specifically the communities of Thousand Oaks, Fillmore, Newbury Park, and Moorpark, as well as Agoura Hills, Calabasas, Westlake, and Oak Park, which are located in Los Angeles County, are in the markets of KDOC, KRCA and KZKI. Accordingly, those stations may exercise their must-carry rights with respect to the system serving these communities. The systems in the communities of Santa Paula, Camarillo, Ojai, and Somis, however, are outside of the market of these three stations. While we recognize that each modification is uniquely tailored to the demonstration made by a particular television station or cable operator, we believe it is reasonable to use the division set forth in *Smith Broadcasters of Santa Barbara* (CSR-3822-A) in this case as well, because it creates market uniformity and gives television stations and cable operators regulatory certainty on which they can base future legal and marketing decisions.

27. In sum, the 1992 Cable Act allows the Commission to include or exclude particular communities from a television station's market to ensure that a television station is carried in the areas which it serves and which form its economic market. In this instance, we conclude that Chronicle has satisfied its burden only insofar as establishing that the public interest would be served by deleting the cable communities in the western portion of Ventura County from the markets of KDOC, KRCA and KZKI.

MUST CARRY ARGUMENTS

showing does not comply with the requirements of §73.686, given the terrain involved as reflected in the terrain profiles submitted by KCRA (which suggest that significant obstacles exist to the reception of even the much closer signals from Mount Wilson), it seems logical that reception in the area would be difficult. This, however, does not negate the fact that the communities are within the area the stations have been licensed to serve. Further, the replacement of Grade B contours with ADIs as a must-carry standard in Section 614 indicates that Grade B contours are not to be used as any absolute measure of the scope of a station's market.

28. In its must-carry complaint, KRCA maintains that it has complied with all of the prerequisites for mandatory carriage of its signal on Chronicle's system serving the communities of Agoura, Calabasas, Camarillo, Fillmore, Moorpark, Santa Paula, Thousand Oaks, and Westlake Village.[28] Specifically, KRCA states that under §76.55(c) of the Commission's Rules, KRCA is entitled to carriage on Chronicle's system, unless (1) it does not deliver a signal of sufficient strength to Chronicle's headend and does not agree to be responsible for the costs of providing such a signal; or (2) it would be considered a distant signal under 17 U.S.C. §111 of the Copyright Act and does not agree to indemnify Chronicle for any increased copyright liability. KRCA contends that, with respect to signal strength, Chronicle has confirmed that KRCA provides a signal to Chronicle's Rasnow headend which satisfies the requirements of §76.55(c)(3) of the Commission's Rules. With regard to copyright royalties, KRCA maintains that on April 29, 1993, Chronicle initially precluded carriage of KRCA because carriage at its Thousand Oaks principal headend would cause an increase in its copyright liability. However, as a result of the passage of the Satellite Home Viewer Act of 1994, KRCA argues that its signal is no longer considered "distant" and carriage would not require the payment of any additional royalties. KRCA notes that on December 12, 1994, it informed Chronicle of the implications of the Home Viewer Act and requested carriage, but Chronicle failed to respond. KRCA then states that on two subsequent occasions, it requested carriage on Chronicle's system; however, Chronicle did not reply.[29] When Chronicle did respond, it did not agree to carry KRCA.

29. Chronicle opposes the complaint of KRCA for the reasons stated in Chronicle's petition for special relief. Specifically, Chronicle argues that KRCA is legally entitled to must-carry status only by virtue of the new must-carry rules which place the entire Los Angeles ADI within KRCA's grasp. Chronicle concedes that it receives a technically acceptable signal from KRCA at its Rasnow Peak headend site. However, Chronicle claims that this is true only because the antenna for its system is located in the Santa Monica Mountains. According to Chronicle, the mountains provide a significant terrain barrier between the station and the communities served by the system. Thus, while Chronicle's headend antenna can receive an acceptable quality signal from KRCA, the communities where the subscribers actually live cannot receive an acceptable quality signal. Chronicle states that it would be misleading to think that the presence of an acceptable quality signal at its headend antenna is equivalent to the presence of such a signal in the communities served by the system. Chronicle further maintains that KRCA does not place a Grade B contour over the communities at issue, it does not have a history of carriage on Chronicle's system, and it cannot be viewed over-the-air. Finally, Chronicle argues that carriage of KRCA would require displacement of one of Chronicle's existing broadcast or non-broadcast services which would be contrary to the public interest since Chronicle's subscribers are already served by several local independent (and network) TV broadcast stations.[30]

30. In its reply, KRCA contends that because Chronicle fails to dispute that KRCA meets all current prerequisites for mandatory carriage on its system, its complaint should be granted without regard to Chronicle's petition. KRCA remarks that §76.55(c) of the Commission's Rules requires that a station only deliver a good quality signal (*i.e.*, -45 dBm for UHF signals) to the principal headend of a cable system within the same television market. KRCA argues that the Commission's rules do not require delivery of the same signal quality to every community within the television market. KRCA further states that the fact that there are terrain barriers within a television market that impede signal reception over-the-air is a reason to grant, not deny, a station must-carry rights. KRCA adds that physical barriers to signal reception are the very reason why local cable carriage is important to broadcast television stations.

DISCUSSION

31. Consistent with the conclusion

[28] With regard to these communities, Chronicle's principal headend is located in Thousand Oaks.

[29] KRCA notes that Chronicle failed to respond within the 30-day period as required by §76.61(a)(2) of the Commission's Rules.

[30] Chronicle notes that the six independent stations currently being carried by this system are KSTV (Ventura); KADY-TV (Oxnard); and KTLA, KCAL, KCOP, and KVEA (all from Los Angeles).

above with respect to the ADI market modification, we will grant KRCA's carriage complaint against Chronicle only as to its cable operations in eastern Ventura and Los Angeles County - the Thousand Oaks system. We begin by noting that §614(a) of the Communications Act of 1934 states that each cable operator shall carry the signals of local commercial television stations. A local commercial television station is defined as any full power broadcast television station that is within the same television market as the cable system.[31] In this instance, Chronicle concedes that, unless the market is changed, KRCA is eligible for carriage by virtue of the Commission's must-carry rules. Contrary to Chronicle's arguments, however, we note that factors such as whether a station has a history of carriage, provides local programming, or is viewable over-the-air may be relevant to an ADI modification request, but are not relevant in determining must-carry status. In addition, the fact that Chronicle may have to drop television broadcast stations or satellite delivered programming services that do not have mandatory carriage rights is not grounds for further delay of KCRA's right to carriage. Rather, a cable operator is required to carry the signals of a local commercial station unless that station fails to deliver a good quality signal to the cable system's principal headend; the station's signal substantially duplicates the signal of another local commercial station which is carried on the system; or the cable operator (with a system of more than 12 usable activated channels) has already allocated up to one-third of the aggregate number of its usable activated channels to other local commercial stations.[32]

32. Section 76.56(b)(2) of the Commission's Rules requires that cable systems with more than 12 useable activated channels devote up to one-third of the channels to carriage of local commercial television stations.[33] According to channel line-up cards submitted by Chronicle, its Thousand Oaks systems carries 66 channels of programming. As such, Chronicle must devote up to 22 channels for the transmission of local commercial television stations on the system. Chronicle, however, is currently carrying only 11 local commercial television stations on its Thousand Oaks system. It is also apparent that Chronicle is carrying other stations that do not have must-carry rights under 47 C.F.R. §76.56(b)(2). We find unconvincing Chronicle's argument that displacement of one of its existing broadcast or non-broadcast services is not warranted. The Commission specifically addressed the issue in *MM Docket 92-259, supra*, stating that the "clear statutory right of carriage . . . applies prospectively notwithstanding the existence of prior agreements between cable operators and cable programming services."[34] The fact that Chronicle may have to drop television broadcast stations or satellite delivered programming services that do not have mandatory carriage rights is not grounds for further delay of KRCA's right to carriage.

33. Chronicle also claims that recent tests conducted by its technicians on March 30 and 31, 1995 reveal that KRCA's signal strength is below the requisite level for a UHF commercial station in the cable communities in question.[35] Section 614(h)(1)(B)(iii) of the Communications Act, however, requires a local commercial television station to deliver to the *principal headend* of a cable system a good quality signal or a baseband video signal.[36] The Act further provides the requisite signal levels for VHF and UHF commercial stations at a cable system's principal headend. To

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[31] *See* 47 U.S.C. §534(h)(1)(A).

[32] *See Clarification Order*, 8 FCC Rcd 4142 (1993). *See also* 47 U.S.C. §§534(b)(5) and (b)(1)(B).

[33] *See* 47 C.F.R. §76.56(b)(2). In its *Report and Order in MM Docket No 92-259*, 8 FCC Rcd at 2972 n. 78, the Commission explained that in order to determine how many channels must be devoted to the transmission of local commercial signals (one-third of the system's usable activated channels), operators may round to the nearest whole number.

[34] 8 FCC Rcd at 2988.

[35] All of the measurements actually appear to be from communities associated with the Thousand Oaks system. We also note that Chronicle initially stated that it received an acceptable quality signal from KRCA at its Rasnow Peak headend site. According to Chronicle, the March 1995 tests reveal that the signal strengths of KDOC and KZKI also fall below the requisite level for UHF commercial stations as well. *See* Chronicle's Reply to Oppositions to Petition for Special Relief, at 2.

[36] We note that the fact that a station does not, in the cable operator's opinion, deliver a good quality signal to the communities within the television market is irrelevant in determining must-carry status.

establish the availability of a VHF commercial station's signal at a cable system's headend, a standard of -49 dBm was set and a standard of -45 dBm was established for UHF commercial station's signals. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend. Moreover, since the cable operator is at the outset in a superior position to know whether or not a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices to measure the signal delivered to the headend. In determining whether a station's signal meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

34. We find that Chronicle did not demonstrate that it used good engineering practices in measuring the signals delivered to its system. As noted above, our rules require signal quality tests to be administered at the principal headend of a cable system.[37] In this case, however, the 21 testing points utilized by Chronicle were in the communities served, and none were consistent with its principal headend locations and coordinates.[38] In addition, we note that when Chronicle conducted the signal tests, only one reading per station was administered at each testing point instead of the required four readings over a two-hour period. Chronicle also neglected to provide the time of day when the tests were administered. In light of this, we conclude that the technical determinations reached by Chronicle are insufficient to demonstrate that KRCA's signal is not of "good quality." Therefore, absent evidence demonstrating that KRCA's signal substantially duplicates the signal of another station carried on Chronicle's system, or that other local commercial stations occupy at least one-third of the aggregate number of usable activated channels on Chronicle's system, we find that KRCA is entitled to carriage on Chronicle's Thousand Oaks system serving the communities of Agoura, Calabasas, Fillmore, Moorpark, Thousand Oaks, and Westlake Village.

ORDERS

35. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition (CSR-4490-A), filed March 13, 1995, by The Chronicle Publishing Company, d/b/a Ventura County Cablevision IS GRANTED IN PART AND DENIED IN PART as indicated in paragraph 26 above. As the market is modified, Chronicle is required to carry the signals of KRCA and KZKI on the Thousand Oaks cable system.

36. IT IS FURTHER ORDERED, that the complaint filed February 2, 1995, on behalf of Fouce Amusement Enterprises, licensee of television station KRCA (CSR-4468-M), IS GRANTED IN PART AND DENIED IN PART as indicated in paragraph 34 above.

37. KDOC, KRCA and KZKI shall notify Chronicle in writing of their carriage and channel position elections (§§76.56, 76.57, 76.64(f) of the Commission's Rules), with respect to the its system serving Thousand Oaks, Fillmore, Newbury Park, and Moorpark, as well as Agoura Hills, Calabasas, Westlake, and Oak Park, within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Chronicle shall come into compliance with the applicable rules within 60 days of such notification.

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[37] *See* 47 U.S.C.§534(h)(1)(B)(iii).

[38] We note that in a letter dated May 28, 1993, Chronicle advised KRCA of each of its headend locations and coordinates: the Camarillo system (latitude 34° 15' 11", longitude 119° 02' 16"); the Ojai system (latitude 34° 25' 15", longitude 119° 15' 13"); and the Thousand Oaks system (latitude 34° 09' 51", longitude 118° 54' 06").

38. This action is taken pursuant to authority delegated under §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Triax Associates V, L.P. CSR-4555-T

Petition for Clarification or Waiver of
Section 76.502 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1995; Released: August 25, 1995

By the Deputy Chief, Cable Services Bureau:

1. Triax Associates V, L.P. ("Triax"), in the above captioned proceeding has requested clarification of the blanket waiver provision of 47 C.F.R. §76.502(g)(2), or in the alternative, a waiver of the three year holding requirement contained in the Commission's anti-trafficking rules for its cable systems serving certain Illinois communities.[1] Triax seeks Commission action so that it may transfer control of its cable systems to OpTel, Inc., or an affiliated entity (collectively "OpTel"). The request is unopposed.

2. Section 76.502 of the Commission's rules implements §617 of the Communications Act, as amended, that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[2] The Commission has broad discretion to grant waivers of the holding requirement.[3]

3. The three-year holding requirement rule, and the underlying statutory provision, are aimed at restricting transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[4] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[5] The Commission also has determined that waiver applications will be looked upon favorably if two-thirds or more of the MSO's subscribers are served by systems owned for three years or more, and if the MSO transfers several systems in a single transaction in which two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three or more years.[6]

4. Triax states the following facts in support of its petition. Triax is a Colorado limited partnership that owns and operates cable television and satellite master antenna television systems ("SMATV") that provide audio and video programming services to approximately 9,386 basic service subscribers located in multiple dwelling units and private developments in the Illinois counties of Cook, DuPage and McHenry. The general partners of Triax are currently negotiating an agreement with OpTel whereby OpTel will acquire all of the outstanding partnership interests in Triax. As a result of the proposed transaction, control of Triax's cable television and SMATV systems will be transferred to OpTel. Triax states that the proposed transaction, which will enable OpTel to lower overhead expenses, serves the public interest because it will improve the ability of the systems to compete with the dominant MSOs in their respective franchise areas. Triax notes that with the exception of the Palos Park and Union systems, it is not the primary cable operator in the communities served by its SMATV and cable systems.

5. Triax explains that since some of its technical facilities either cross a public right of way or provide service to buildings that are not commonly

[1] The cable systems subject to the transfer of control, and held less than three years, include: Arlington Place, Country Lakes, Garden Glen, Sullivan Lakes, The Hallmark, and Village Tree.

[2] 47 C.F.R. §76.502; §617 of the Communications Act of 1934, as amended, 47 U.S.C. §537.

[3] 47 U.S.C. §537(d); *See also Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264*, ¶ 78, 8 FCC Rcd 6828, 6839 (1993) ["*First Report and Order*"], *recon. granted in part and denied in part*, 10 FCC Rcd 4654 (1995) ["*Reconsideration Order*"]; 47 C.F.R. §76.502(g).

[4] *First Report and Order* at ¶¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833.

[5] *Reconsideration Order*, 10 FCC Rcd at 4687.

[6] 8 FCC Rcd at 6836; 47 C.F.R. §76.502(g)(1).

owned, they are technically considered cable systems under the Commission's rules. Triax has owned six of these cable systems for less than three years. The operator asks that the Commission confirm that the blanket waiver provision of §76.502(g)(2) applies to transactions involving transfers of control of multiple cable systems, each of which serve less than 1,000 subscribers. Triax maintains that there is no policy rationale for treating transfers of control differently from a sale of assets under the blanket waiver. Alternatively, Triax asks the Commission to grant a waiver of the three year holding requirement for the affected cable systems because each of the systems serves less than 1,000 subscribers, and more than two-thirds of its subscribers, or about 77% in this case, are served by cable and SMATV systems that have been owned for more than three years. Triax asserts that a waiver of the three year holding requirement is warranted in this case because the proposed transaction does not raise any of the public policy concerns underlying the requirement. The operator concludes by stating that the proposed transaction does not require the consent of any local franchising authority.

6. We will grant Triax's request with respect to the six cable systems serving Arlington Place, Country Lakes, Garden Glen, Sullivan Lakes, The Hallmark, and Village Tree. We believe that neither Congress nor the Commission, when drafting the relevant provisions in §617 of the Communications Act and §76.502(g)(2) of the Commission's Rules, meant to treat transfers of control differently from a sale of assets under the blanket waiver. Moreover, neither the statute nor our rules contain language that would effectively prohibit applying a blanket waiver in situations such as this one.[7] Although we need not reach the issue since we resolve the matter in favor of the cable operator, we note that Triax would have qualified for a waiver because it has sufficiently demonstrated that two-thirds or more of its subscribers subject to the proposed transaction have been held for more than three years. In any case, we find that this transfer of control would not adversely affect the policies underlying the anti-trafficking rule. In fact, the transfer would serve the public interest because it could spur competition in the provision of multichannel video programming service in those franchise areas where Triax's systems now compete against the primary cable operator. Finally, no oppositions have been filed against the petition and the transfer does not require the additional consent of any franchising authority.

7. In view of the above, IT IS ORDERED, that the captioned request filed by Triax Associates V, L.P. IS GRANTED.

8. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[7] *See, e.g.*, 47 U.S.C. §537 (d) ("WAIVER AUTHORITY.--The Commission may, consistent with the public interest, waive the requirement of subsection (a), except that, if the franchise requires franchise authority approval of a transfer, the Commission shall not waive such requirements unless the franchise authority has approved the transfer. The Commission shall use its authority under this subsection to permit appropriate transfers in the cases of default, foreclosure, or other financial distress."); 47 C.F.R. §76.502(g)(2) ("Conditioned upon receipt of local franchise authority transfer approval, where such approval is required by the terms of the franchise agreement or applicable state or local law, transfers of cable systems serving less than 1,000 subscribers shall be subject to a blanket Commission waiver.").

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Scripps Howard Cable Company

CUID No. GA0671
(Unincorporated Villa Rica)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1995 Released: August 24, 1995

By the Acting Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the unincorporated areas of Villa Rica, Georgia. Operator requested that the Commission dismiss the complaint arguing that it is subject to effective competition and thus its cable programming service rate is not subject to regulation by the Commission.[1] Operator did not file a rate justification as required by the Commission's Rules.[2]

2. The complaint regarding Operator's CPS rate for the unincorporated areas of Villa Rica was filed with the Commission on November 1, 1993. In response, Operator filed letters on May 22, 1995 and August 3, 1995 requesting the Commission to dismiss the complaint.

Discussion

3. In its letters, Operator asserts that its cable system is subject to effective competition, and therefore its cable programming service rate is not subject to rate regulation, because it serves fewer than 30 percent of the households (*i.e.*, occupied housing units)[3] within its franchise area, the unincorporated areas of Carroll County, which includes the unincorporated areas of Villa Rica.[4] Specifically, Operator claims that in October 1993, it served a total of 1784 subscribers, or 11.7 percent of the 15,220 households in the unincorporated areas of Carroll County, Georgia. As supporting documentation, Operator submits a copy of the relevant 1990 Census data which shows that there are 15,220 households in the unincorporated areas of Carroll County. In addition, Operator provides a computer print-out as of October 1993 with sufficient subscriber information to support its claim that it served 1784 households in the franchise area. Further, Operator provides a copy of the franchise from Carroll County.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[5] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[6] Operator has met this burden. Operator appropriately

[1] 47 C.F.R. § 76.905.

[2] 47 C.F.R. § 76.956; *see also* Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752, para. 3(1) (Cab. Serv. Bur. 1994).

[3] As the Commission has noted, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*Third Order on Reconsideration*). The term "household" is defined by the Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[4] The Communications Act of 1934, as amended (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a)) provide that only rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623 (L)(1)(A), 47 U.S.C. § 543 (L)(1)(A); 47 C.F.R. § 76.905(b)(1).

[5] 47 C.F.R. § 76.906.

[6] *Cf.* 47 C.F.R. § 76.911(b)(1).

relied on data reflecting the number of households as required by our rules.[7] Relying on this data, Operator submitted sufficient evidence demonstrating that, at the time the CPS complaint was filed, its cable system served 1784 of the 15,220 households, or 11.7 percent of the households, within the unincorporated areas of Carroll County. Thus, we find that Operator's system serving the unincorporated areas of Carroll County is subject to effective competition, and we will therefore dismiss the complaint filed against the CPS rate in the unincorporated areas of Villa Rica, Georgia, CUID No. GA0671.

Conclusions

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against Operator's cable programming service price charged in the unincorporated areas of Villa Rica, Georgia, CUID No. GA0671, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William Johnson
Acting Chief, Cable Services Bureau

[7] *See Third Order on Reconsideration, supra.*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION,

Complainant, File No. E-92-28

v.

CINCINNATI BELL TELEPHONE COMPANY,

Defendant.

ORDER

Adopted: August 17, 1995; Released: August 25, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1992, Litel Telecommunications Corporation filed the above-captioned complaint against Cincinnati Bell Telephone Company, (CBT) seeking to recover damages from CBT for alleged violations of the Commission's rules in connection with CBT's computation and assessment of terminating carrier common line ("CCL") charges. On August 11, 1995, the parties filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,

Complainant, File No. E-92-46

v.

CINCINNATI BELL TELEPHONE COMPANY,

Defendant.

ORDER

Adopted: August 17, 1995; Released: August 25, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 21, 1992, Charter Network Company filed the above-captioned complaint against Cincinnati Bell Telephone Company, (CBT) seeking to recover damages from CBT for alleged violations of the Commission's rules in connection with CBT's computation and assessment of terminating carrier common line ("CCL") charges. On August 11, 1995, the parties filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECHARGE, INC.,

Complainant, File No. E-92-79

v.

BLUFFTON TELEPHONE COMPANY,

Defendant.

ORDER

Adopted: August 17, 1995; Released: August 25, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 1, 1992, International Telecharge, Inc. filed the above-captioned complaint against Bluffton Telephone Company (Bluffton) seeking to recover damages from Bluffton for alleged violations of the Commission's rules in connection with Bluffton's computation and assessment of terminating carrier common line ("CCL") charges. On August 11, 1995, the parties filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

Atlantic Morris Broadcasting, Inc.
(Assignor)

and File No. BAL-950420GJ

South Jersey Radio, Inc.
(Assignee)

For Assignment of License of
WKTU(FM), Ocean City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1995; Released: August 25, 1995

By the Commission:

1. The Commission has before it: (1) an application seeking to assign the license of station WKTU(FM) from Atlantic Morris Broadcasting, Inc. to South Jersey Radio, Inc. ("South Jersey") and (2) a related request for waiver of 47 C.F.R. § 73.3555(b), the Commission's one-to-a market rule, which prohibits common ownership of radio and television stations in the same market.[1] The assignment application and waiver request are unopposed. Upon our consideration of the record before us, we conclude that the waiver request and assignment application should be granted.

A. The Waiver Request

2. South Jersey is currently the licensee of three stations in the Philadelphia market: UHF television station WMGM-TV, Wildwood, New Jersey (an NBC network affiliate); WMGM(FM), Atlantic City, New Jersey; and WOND(AM), Pleasantville, New Jersey. The Commission approved a one-to-a-market waiver for that AM-FM-TV combination in 1981.[2] South Jersey now seeks an additional permanent waiver to acquire station WKTU(FM). That FM station and South Jersey's existing television station, WMGM-TV, are considered to be in the same market because WKTU(FM)'s community of license (Ocean City) falls entirely within the Grade A signal contour of WMGM-TV.

3. South Jersey bases its waiver request on the one-to-a-market waiver standards adopted in the Second Report and Order in MM Docket 87-7, 4 FCC Rcd 1741 (1989) ("Second Report and Order"), recon. granted in part and denied in part, 4 FCC Rcd 6489 (1989).[3] Under these standards, the Commission will presume that waiver of the rule will serve the public interest in cases involving stations serving the top 25 markets where at least 30 separately owned, operated and controlled stations will remain after the proposed combination ("top 25 market/30 voice standard"). See 47 C.F.R. §73.3555, n. 7. The Commission also makes this public interest presumption in cases involving "failed" broadcast stations (stations that have not been operating for a substantial period of time, or that are involved in

[1] For purposes of the one-to-a-market rule, stations are considered to be in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. See 47 C.F.R. §73.3555(c).

[2] See Jersey Cape Broadcasting Corp., 85 FCC 2d 654, 662-66 (1981), recon. denied., 89 FCC 2d 984 (1982).

[3] Because the principal community contours of WOND(AM), WKTU(FM), and WMGM(FM) overlap, South Jersey must also meet the requirements of the radio local ownership rule found in Section 73.3555(a) of the Commission's rules. See 47 C.F.R. §73.3555(a)(1). South Jersey states that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of the principal community contour overlap of same service stations WKTU(FM) and WMGM(FM) occurs within the Atlantic City-Cape May radio metro market, as defined by Arbitron, Inc., South Jersey supplies audience share data from the most recent Arbitron survey available from that market at the time the instant application was filed. See 47 C.F.R. §73.3555(a)(3)(iii). Those data show that the combined audience share of WOND(AM), WKTU(FM), and WMGM(FM) in that metro market is 11.3 percent, and therefore below the 25 percent audience share limit set forth in the radio ownership rule. Accordingly, the proposed combination of radio stations satisfies the local radio ownership provisions of our rules.

bankruptcy proceedings). Id. Other waiver requests are evaluated on a more rigorous case-by-case basis, as set forth in the Second Report and Order.

4. South Jersey's waiver request must be reviewed under the case-by-case standard because the proposed transaction involves the potential ownership of an AM and 2 FM stations in the same market and, therefore, as explained in note 3 supra, invokes local radio ownership limits. See In re Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6394, n. 40 (1992). Under the case-by-case standard, we make a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities such as the economies of scale, cost savings and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. See Second Report and Order, 4 FCC Rcd at 1753-54. South Jersey addresses each of the case-by-case factors.

5. **Benefits of Joint Operation.** South Jersey contends that the proposed combination of WOND(AM), WMGM(FM), WKTU(FM), and WMGM-TV will create efficiencies in several ways. First, the company plans to combine the stations' management personnel and production staffs. The company estimates that this will result in annual savings of $81,794. Second, the company expects to consolidate sales offices, share equipment, and obtain volume discounts on purchases. For example, WKTU(FM) would relocate to South Jersey's existing office space, reducing the station's expenses for rent and utilities. These operational changes would reduce WKTU(FM)'s expenditures by $68,062 per year. In total, South Jersey projects savings of approximately $149,856 per year.

6. South Jersey asserts that it would use the savings from joint operation of the stations to improve WKTU's public affairs programming. These improvements would consist of news programs, weather reports (including marine weather), traffic reports, daily local public service announcements, and regularly scheduled public affairs programming. The company states that after the proposed sale, WKTU(FM) would have access to WMGM-TV's news department, which focuses on the gathering and presentation of local news. South Jersey also states that WKTU(FM) would benefit from the company's experience in the local employment market, particularly South Jersey's access to recruitment sources and knowledge of hiring conditions.

7. **Type of Facilities.** Regarding the technical facilities involved, South Jersey states that WKTU(FM) is a Class A FM station operating on 98.3 MHz with 3kw effective radiated power ("ERP") and an antenna height of 100 meters above average terrain ("HAAT"). WMGM(FM) is a Class B FM station on 103.7 MHz with 50kw ERP and 106 meter HAAT. WOND(AM) is a Class C (formerly Class IV) AM facility which operates on 1400 kHz with 1 kw power, omnidirectional, with unlimited hours. WMGM-TV is a UHF station, operating on channel 40, as an affiliate of the NBC network, with 741 kw ERP (visual) from an antenna HAAT of 128 meters.

8. South Jersey argues that the facilities in its proposed combination are comparable to others in the area. It states that 11 other FM stations in the Atlantic-Cape May-Cumberland area are Class A facilities, like the station to be acquired WKTU(FM). South Jersey's existing AM station WOND is a Class C AM station, which competes with three other Class C AM stations in the tri-county area. There are five other Class B FM stations similar to the applicant's FM station WMGM(FM). The applicant states that its television station, WMGM-TV, is a UHF station like 14 other UHF competitors in the relevant ADI, competing with four more powerful VHF television stations.

9. **Other Media Outlets of this Applicant.** South Jersey reports that it owns WOND(AM), WMGM(FM), and WMGM-TV in this market. It also owns WONZ(AM), Hammonton, New Jersey but states that WONZ(AM) is not part of the one-to-a-market combination under consideration because the relevant signals of WONZ(AM) and of South Jersey's other stations do not overlap.[4] As previously discussed in footnote 3, South Jersey demonstrates that it's ownership of same service radio stations is consistent with the Commission's local radio ownership rule.

[4] WONZ(AM) does not have 5.0 mV/m contour overlap with WOND(AM). The 2.0 mV/m contour of WONZ(AM) does not encompass WMGM-TV's community of license (Wildwood, New Jersey) and the Grade A contour of WMGM-TV does not encompass WONZ(AM)'s community of license (Hammonton, New Jersey).

10. South Jersey is also the permittee of a low power television station, W07CE, Atlantic City, New Jersey, which is being operated pursuant to a special temporary authorization. Low power stations are not considered "voices" for the purpose of one-to-a-market waiver requests. See Second Report and Order, 4 FCC Rcd at 1751. South Jersey also publishes two weekly newspapers in the area: the Sentinel-Ledger in Somers Point-Ocean City, New Jersey (circulation 10,888) and the Star and Wave in Cape May County, New Jersey (circulation 6,000). South Jersey points out that Section 73.3555(c) of the Rules, which prohibits common ownership of broadcast stations and daily newspapers, does not apply to these weekly publications.

11. **Financial Condition.** The applicant asserts that WKTU's financial performance has not been consistent. The station's earnings for the past three years were: a $17,718 profit in 1992; a $3, 071 loss in 1993; and a $113,964 profit in 1994. South Jersey states that although 1994 was a good year for the station, the following factors diminish the station's future prospects for success: the station achieved only a 2.5 share in the most recent radio ratings; and most of the major stations in the region are consolidating making it difficult for WKTU to operate as a stand-alone station.

12. **Competition and Diversity.** Finally, the applicant addresses competition and diversity in the market. In this context, the Commission considers the number of separately owned and operated broadcast "voices," the degree of cable penetration, and the extent of other non-broadcast media in the area. Typically, we will consider the relevant TV metro market for radio stations and the relevant ADI (Area of Dominant Influence) for TV stations. See Second Report and Order, 4 FCC Rcd at 1760, n. 101. However, in several cases in which the relevant ADI was very large but the stations involved in a transaction competed only in a relatively small local community, we have accepted alternative methods for determining the number of relevant voices. Glendive Broadcasting Corporation, 10 FCC Rcd 2708, 2711 (1994); Duane J. Polich, 4 FCC Rcd 5596, 5597 (1989).

13. In the present case, the applicant computes the number of television stations using the usual method of considering all television stations within the ADI. However, the applicant provides an alternative to the usual analysis of radio stations. Instead of counting all radio stations within the Philadelphia television metro market, South Jersey focusses on the smaller number of radio stations in the counties of Atlantic, Cape May, and Cumberland (the three counties covered by the principal community contours of the radio stations South Jersey proposes to own). South Jersey apparently presents this alternative showing because all of the stations involved in the present transaction are licensed to smaller communities that fall outside the Philadelphia TV metro market and the principal community contours of the radio stations involved do not reach that metro market.

14. South Jersey shows that, including its own stations and WKTU(FM), there are currently 32 radio stations (11 AM and 21 FM) with 24 separate owners licensed within the Atlantic-Cape May-Cumberland county area. With respect to television stations, South Jersey states that the relevant Philadelphia ADI, in which South Jersey's television station is located, is ranked fourth in the country, with 19 television stations, licensed to 18 different licensees. Considering radio and television together, there are a total of 51 broadcast stations with 41 separate licensees.[5] If the proposed assignment were granted, the number of separate voices in the market would be reduced to 40.

15. The applicant also presents information with respect to non-broadcast media. It states that cable penetration in the Philadelphia market is 73.3%. In the counties of Atlantic, Cape May, and Cumberland there are five separate cable companies, which pass 232,584 households, of which 75.6% subscribe. Atlantic, Cape May, and Cumberland Counties have three locally published daily newspapers and 16 weekly newspapers. Daily newspapers published outside of these counties but within the television ADI, such as the Philadelphia Inquirer and the Philadelphia Daily News also are sold there.

B. Discussion

16. In evaluating a request for waiver of the one-to-a-market rule, our goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved."

[5] These combined numbers reflect that the applicant, South Jersey, owns a television station as well as radio stations.

See Second Report and Order Recon., 4 FCC Rcd at 6491. The Commission does not require that all five of the case-by-case criteria be satisfied as a precondition of a waiver but rather that the overall consideration of these factors weighs in favor of the public interest. Id. Upon our review of the entire record of the current case under the Commission's case-by-case criteria we conclude overall, that the applicant has shown that a waiver in this instance would be consistent with the public interest.

17. South Jersey demonstrates that joint operation of WMGM-TV, WMGM(FM), WOND(AM), and WKTU(FM) will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits. In particular, the company will save approximately $149,856 annually and will use this money to enhance WKTU's public affairs programming. Further, after the transaction, WKTU(FM) will have access to the local news gathering abilities of WMGM-TV's news department.

18. With respect to South Jersey's media holdings, which include two weekly newspapers as well as several broadcast stations, we note that these holdings are not insubstantial. Nevertheless, we find that in this market the proposed combination would not create undue concentration of ownership and control. This is a major market, comprising the country's 4th largest television ADI. The market is highly competitive, both in terms of number of other broadcast stations and the relevant market shares of the stations involved in this transaction.[6] Based on South Jersey's showing, the market will be served by at least 32 radio stations and 19 television stations.[7] Following the proposed acquisition of WKTU(FM), those 51 broadcast outlets will be owned and operated by 40 separate entities. Other "voices" in the market are also plentiful, with at least three major daily newspapers, 14 weekly newspapers (not including two published by South Jersey), and cable television, which has a penetration rate of at least 73.3 percent. Further, South Jersey has shown that the technical facilities involved in the proposed combination are comparable to others in the market and, therefore, are unlikely to dominate the market.

19. With respect to finances, the station to be acquired, WKTU(FM), is in no immediate financial distress. Nevertheless, the station does have an inconsistent history of financial performance. Taking into account all of the factors considered above, we are persuaded that common ownership of WKTU(FM), WOND(AM), WMGM(FM), and WMGM-TV would serve the public interest.

20. Accordingly, IT IS ORDERED, that the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), IS GRANTED, and, having found the parties thereto otherwise qualified, the application for assignment of license (BALH-950420GJ) of WKTU(FM) Ocean City, New Jersey, from Atlantic Morris Broadcasting, Inc. to South Jersey Radio, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] As South Jersey shows, in the Fall 1994 Arbitron Metro Market Report for the Atlantic City-Cape May radio survey area, WOND(AM) ranked second, with a 6.1 share; WMGM(FM) ranked eleventh with a 2.7 share; and WKTU ranked second, with a 2.5 share. Similarly, WMGM-TV had a 2.6 net weekly circulation in the Philadelphia market, as reported in the May 1994 edition of the Nielsen Station Index.

[7] As noted, South Jersey takes a conservative approach of counting only those radio stations licensed in three counties and presents no data for the radio stations in the larger Philadelphia TV metro market. The number of radio voices with which South Jersey competes may be even greater than that shown because of the proximity of South Jersey's radio stations to the Philadelphia TV metro market.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

MORTON JEROME VICTORSON,
BANKRUPTCY TRUSTEE

and

File No. BALH-921221HL

WEST VIRGINIA RADIO CORPORATION

OF CLARKSBURG

For Assignment of License of
WKKW(FM), Clarksburg,
West Virginia

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1995; Released: August 25, 1995

By the Commission:

1. The Commission has under consideration an "Application for Review" filed on November 21, 1994 by Mills Broadcasting, Inc. ("Mills"). Mills requests review of the action of the Chief, Audio Services Division by letter dated October 21, 1994, which dismissed its petition for reconsideration and affirmed the grant of the above-captioned application for assignment of license of Station WKKW(FM), Clarksburg, West Virginia, from Morton Jerome Victorson, Bankruptcy Trustee, to West Virginia Radio Corporation of Clarksburg ("West Virginia Radio").[1]

2. Background/Arguments. In its petition for reconsideration, Mills argued that West Virginia Radio included an out-of-state county in demonstrating that its acquisition of WKKW(FM) would comply with the audience share limits of the local radio ownership rules and that once that county's data was removed from consideration, the combined audience share of the proposed combination would exceed the Commission's 25 percent audience share cap. See 47 C.F.R. §73.3555(a)(1)(ii). Specifically, Mills claimed that the inclusion of Fayette County, which is within the Pittsburgh, Pennsylvania radio metro market, as defined by Arbitron, skews West Virginia Radio's audience share analysis. In the October 21, 1994 letter, the Chief, Audio Services Division determined that (1) Mills did not have standing as a party to the proceeding, (2) Mills had failed to justify its lack of participation in the earlier stages of the proceeding, and (3) Mills' contentions regarding West Virginia Radio's multiple ownership showing were without merit. See Letter from Chief, Audio Services Division, Ref. 1800B3-MFW, dated October 21, 1994 ("staff ruling").

3. In its application for review, Mills contends that the staff did not sufficiently address the public interest concerns raised by its petition for reconsideration but focused solely upon procedural issues. According to Mills, it does have "standing to challenge the instant assignment application and has shown a sufficient public interest stake in the matter to warrant full consideration of the petition on the merits." Further, Mills reiterates its argument that it was unable to participate earlier in the proceeding because it did not have time to undertake a proper analysis of West Virginia Radio's multiple ownership showing. Mills also argues that it is inappropriate, in this case, to determine the combined audience share of the stations proposed to be commonly owned by strict adherence to the county-by-county standard set forth in the Commission's rules. 47 C.F.R. § 73.3555(a)(3)(iii). Specifically, Mills asserts that the applicants "expand[ed] the area of consideration to include a remote county where the overall population is high and the station penetration is low" resulting in audience share statistics that do not "fairly portray the actual audience share in the local West Virginia radio market or recognized equivalent." Mills contends that the local Area of Dominant Influence (ADI) is a recognized equivalent to an Arbitron radio metro market and that, by isolating the four counties that comprise the ADI in which the majority of the overlap between the radio stations occurs, the combined audience share of the proposed combination is 27.21%.

4. Discussion. Section 1.106(b)(1) of the rules states that "any party to the proceeding, or any other person whose interests are adversely affected by any action take by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken." The rule further states that any

[1] On December 6, 1994, West Virginia Radio filed an opposition and on December 21, 1994, Mills filed a reply.

person who is not a party to the proceeding must "show good reason why it was not possible . . . to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). With respect to the first factor, we note that Mills holds a second lien in excess of $800,000 on the assets of WKKW(FM). The Commission will not, when a licensee is in bankruptcy, restrict intervention in the proceedings solely to the trustee, but will allow a creditor of the licensee corporation to intervene if that creditor can show that a potential direct and substantial injury could result from the outcome of the proceeding. See Image Radio, Inc., 12 RR 2d 671, aff'd 13 FCC 2d 59 (1968). Here, Mills, as a subordinated creditor of the assignor, will receive less than full value from the proceeds of the sale. However, while Mills has shown a sufficient threat of economic injury from the outcome of this proceeding, we find that Mills has failed to satisfy the second requirement of 47 C.F.R. § 1.106(b)(1): In particular, Mills' assertion that it did not have time to undertake the proper analysis during the 30-day statutory petition period or during the two months between the filing and grant of the instant application, is insufficient to establish good cause for failing to participate earlier in the proceeding. See, e.g., Pueblo Stereo Broadcasting Corp., 32 FCC 2d 734 (1971). Accordingly, we affirm the staff's determination that Mills' petition for reconsideration was procedurally defective. On our own motion, however, we elect to consider Mills' argument concerning the proper scope of audience share determinations under our rules.

5. We reject Mills' assertion that West Virginia Radio submitted inappropriate audience share data to demonstrate compliance with the local radio ownership rules. Here, the principal community contour of WVAQ, one of the stations involved in the transaction, penetrates well into Fayette County, Pennsylvania, where the station has an audience share of 6.1%. We find no merit to Mills' claims that Fayette County should be excluded from consideration in the audience share analysis because it is (1) part of the Pittsburgh radio metro market and (2) disproportionately populous in relation to the other counties served by the stations. Mills suggests that we should disregard the plain language of the local radio ownership rules and base the station's audience share on Mills' definition of what it believes to be the "market" actually served by the stations, namely the four counties that comprise the television ADI in which the majority of the overlap between the radio stations takes place. The 25 percent audience share limit was intended to safeguard against competition and diversity concerns relating to the common ownership of radio stations only. A television ADI, which is a geographically designated area for measuring television viewing patterns, has no relevance in assessing these concerns.

6. The Commission has stated that audience share data "are a probative and accessible measure of market power relevant to the Commission's regulatory concerns" with competition and diversity. Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket 91-140 ("Radio Rules Revision"), 7 FCC Rcd 6387, 6397 (1992). Section 73.3555(a)(3)(iii) of the rules states that a station's audience share is the "average number of persons age 12 or older on an average quarter hour basis . . . who listen to the station, expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap takes place." 47 C.F.R. § 73.3555(a)(3)(iii). The Commission further determined that where the contour overlap between proposed commonly owned same service stations occurs outside a designated Arbitron radio metro market, audience share statistics, weighted on the basis of population, for each county encompassed in whole or in part by the principal community contours of the stations to be commonly owned, are most reflective of the relevant competitive market involved. See Radio Rules Revision, 7 FCC Rcd 6398 (1992); 47 C.F.R. § 73.3555(a)(3)(iii). Mills has not presented any evidence, other than its own characterizations, that would rebut the presumption that this rule-based approach is appropriate in this case. Insofar as Mills is requesting that the Commission consider alternative definitions for determining the relevant market for audience share purposes, the appropriate course of action would be a request for rulemaking. See Patteson Brothers, Inc., 8 FCC Rcd 7595, 7596 (1993).

7. In sum, West Virginia Radio has demonstrated that there are greater than 15 stations in the market and has submitted county data pursuant to the Commission's rules. That data demonstrates that the combined audience share for the proposed combination is 21.85 percent, well within the Commission's 25 percent audience share limit. We therefore affirm the staff's grant of the assignment application to West Virginia Radio.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the "Application for Review" filed on November 21, 1994 by Mills Broadcasting, Inc. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr., d/b/a
REM MALLOY BROADCASTING
File No. BPH-860627MH

PEEBLES BROADCASTING COMPANY
File No. BPH-860603ME

James S. Lee and
Donald L. Baker, d/b/a
INTERACTIVE MEDIA File No. BPH-860707MS

FREE AIR CORPORATION
File No. BPH-860707NH

BERNARD DAWSON File No. BPH-860707NW

SPECIAL MARKETS MEDIA, INC.
File No. BPH-860703MH

For Construction Permit
For A New FM Station on
Channel 275A, Raleigh,
North Carolina

ORDER

Adopted: August 14, 1995; Released: August 25, 1995

By the Commission:

1. Before the Commission for consideration is our Memorandum Opinion and Order, 10 FCC Rcd 503 (1995), a Petition for Reconsideration filed January 18, 1995 by Free Air Corporation, an Opposition filed January 27, 1995 by Bernard Dawson, and a Reply filed February 3, 1995 by Free Air; the Review Board's Decision in this proceeding, 10 FCC Rcd 4974 (Rev. Bd. 1995), an Application for Review filed May 25, 1995 by Free Air, and an Opposition filed June 9, 1995 by Peebles Broadcasting Company, Interactive Media, and Dawson; together with a Joint Motion for Expedited Consideration of Free Air Corporation's Application for Review filed June 30, 1995 by Dawson, Peebles and Interactive Media, and an Opposition to Joint Motion filed July 6, 1995 by Free Air. Having carefully considered the matters of record herein concerning the Board's ruling, we agree with its disposition of this case and affirm its Decision.[1]

2. In our preceding order, we denied Free Air's request to disqualify Dawson's counsel based on the latter's purported affiliation with a law firm that had previously represented Free Air in this proceeding, 10 FCC Rcd at 506 ¶¶ 18-21. In seeking reconsideration, Free Air asserts that it has now discovered evidence showing both that Dawson's counsel has filed pleadings with the Commission using the letterhead of Free Air's former law firm and that files of Free Air in possession of Free Air's former law firm were lost sometime in 1990.[2] Based on these circumstances, Free Air contends that Dawson's counsel should be disqualified from participation in this proceeding.

3. Free Air's petition for reconsideration is procedurally deficient and it will be summarily dismissed. Under 47 C.F.R. § 1.106(c), a petition for reconsideration which relies on facts not previously presented to the Commission may be granted only if: (a) they relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, (b) they were unknown to petitioner until after the last opportunity for presentation and could not, through the exercise of ordinary diligence, have been learned prior to such opportunity, or (c) their consideration is required in the public interest. The circumstances on which Free Air now relies clearly relate to events that occurred and that could have reasonably have been learned prior to the

[1] In light of our timely action on Free Air's Application for Review, the Joint Motion for Expedited Consideration is dismissed as moot.

[2] Free Air attached to its petition one page of the transcript of a conference before the ALJ in this proceeding, assertedly indicating that Dawson's counsel filed matters in this proceeding under the letterhead of Free Air's former law firm, and a letter dated November 7, 1994 from a partner in Free Air's former law firm stating that the firm no longer has any files for Free Air in its possession, that a number of its files were destroyed in 1990 due to water damage, and that the writer surmised that any Free Air files that the firm might still have had at that time "were in the boxes that were damaged by the flooding."

filing of its motion to disqualify counsel and they are not of such moment as to establish that further consideration of this matter is required in the public interest. In any event, in light of the fact that Free Air's application has been dismissed for lack of prosecution, it does not appear that Free Air's contentions about the role of Dawson's counsel in this case have any further relevance in this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §§ 1.106(c) and 1.115(g) the Petition for Reconsideration filed January 18, 1995 by Free Air Corporation IS DISMISSED, the Application for Review filed May 25, 1995 by Free Air Corporation IS DENIED, and the Joint Motion for Expedited Consideration of Free Air Corporation's Application for Review filed June 30, 1995 by Bernard Dawson, Peebles Broadcasting Company and Interactive Media IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

Infinity Broadcasting Corp.
of California File No. BALH-930618GE

For Consent to Assignment
of License of

KRTH(FM), Los Angeles, CA

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1995; Released: August 25, 1995

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has under consideration a petition for reconsideration filed March 3, 1994, by Americans for Responsible Television ("ART"). ART requests reconsideration of the Commission's February 1, 1994 grant of the above-captioned application assigning station KRTH(FM), Los Angeles, California, from Beasley FM Acquisition Corp. ("Beasley") to Infinity Broadcasting Corp. of California ("Infinity").[1]

2. ART's petition for reconsideration raises three issues. First, ART argues that former Commissioner Duggan's participation in the vote on ART's informal objection to the assignment was improper. Second, ART asserts that the Commission wrongly determined that the initial filing against the assignment was an informal objection, rather than a petition to deny. Finally, ART claims that Infinity should not be allowed to acquire an additional radio station because Infinity aired indecent language on some of its existing stations.[2] For the reasons stated below, we deny the petition for reconsideration.

Commissioner Duggan's Participation

3. Petitioner claims that Commissioner Duggan should have recused himself from participation in this proceeding. Specifically, ART claims that Commissioner Duggan's vote served to benefit the Public Broadcasting Service ("PBS"), where he became President and CEO the day following his vote. Petitioner argues that PBS and Infinity, due to their joint participation in Action for Children's Television v. FCC, 15 F.3d 186 (D.C. Cir. 1993), reh'g en banc Nos. 93-1092 & 93-1199, (D.C. Cir. June 30, 1995) ("ACT III")[3], had an intertwined financial interest that created a mandatory basis for recusal. Further, Petitioner asserts that Commissioner Duggan's participation in this proceeding violated an "appearance of fairness" standard.

4. The legal standard for determining when a prospective employment arrangement requires recusal is set forth in 18 U.S.C. Section 208 and the implementing regulations of the Office of Government Ethics (OGE).[4] Section 208 prohibits an employee from participating personally and substantially in an official capacity in any matter in which a person with whom he has a future employment arrangement has a financial interest.

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[1] After receiving an extension of time in which to respond, Infinity filed an opposition on April 13, 1994.

[2] Although ART did not establish standing as a petitioner in the proceeding below and the Commission ordinarily does not allow informal objectors who could have filed a proper petition to deny to file petitions for reconsideration, see, e.g., License Renewal Applications, 7 FCC Rcd 6045 (1992), we find it appropriate to consider the arguments raised in this case. In particular, we find it in the public interest to address the charges of impropriety by Commissioner Duggan in order to not leave unresolved allegations of an ethical breach.

[3] Subsequent to ART's filing its petition for reconsideration, the United States Court of Appeals, D.C. Circuit, delivered its en banc decision. In essentially upholding the Commission's restrictions concerning the broadcast of indecent material, the court ruled against the positions taken by Infinity and PBS.

[4] Petitioner also relies on 47 C.F.R. Section 19.735-204(a) and (e) of the Commission's conflict of interest rule regarding financial interests of employees. Petition at 12. However, on February 3, 1993, regulations establishing new uniform standards of conduct for Executive Branch employees (including 5 C.F.R. Sections 2635.602, 2635.606 and 2635.402) became effective. Standards of Ethical Conduct for Employees of the Executive Branch, 57 FR 35006 (August 7, 1992). Thus, OGE's rules – not 47 C.F.R. Section 19.735-204(a) and (e) – were the standards in effect when the KRTH(FM) decision was issued on February 1, 1994. In any event, for the same reasons discussed here concerning OGE rules, the Commission's rule would not have precluded participation by Commissioner Duggan.

5. The applicable OGE ethics rules, 5 C.F.R. Sections 2635.602 and 2635.606, elaborate that disqualification should occur in any matter that will have a direct and predictable effect on the financial interests of the prospective employer. A matter has a "direct" effect on a financial interest "if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest." 5 C.F.R. Section 2635.402(b)(1)(i). Significantly, a matter does not have a direct effect, according to the rules, "if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter." Id. A matter has a "predictable" effect on a financial interest "if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest." 5 C.F.R. Section 2635.402(b)(1)(ii).

6. Applying this standard, there is no basis to conclude that Commissioner Duggan erred in participating in the instant case because there was no indication that a Commission decision regarding Infinity's acquisition of station KRTH(FM) would have a "direct and predictable effect" on the financial interests of PBS, Commissioner Duggan's then future employer. It is true, as petitioner states, that both PBS and Infinity were participants in the ACT III proceeding, which involved the FCC's restrictions on the broadcasting of indecency. It does not follow, however, that the Commission's action on the KRTH(FM) assignment application would have any effect on the outcome of the ACT III litigation, and, hence, on PBS, much less a direct and predictable effect. In this regard, ART speculates only that a determination to deny this application "could well affect the outcome of the en banc decision [then pending in ACT III] by setting a precedent which the court might be asked by PBS and Infinity to overturn, and by generating legal argument for the court to consider." Petition at 11. However, the alleged connection between any such possibility in the court case and the Commission's KRTH decision was far too weak and uncertain to lead to the conclusion that PBS had a direct and predictable financial interest in the outcome of the Commission's decision in this case.[5]

7. Citing Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970), Petitioner also claims that Commissioner Duggan's failure to recuse himself violated his obligation to attend these proceedings with "the very appearance of complete fairness." Id. at 591. We find no merit to this contention. Petitioner's claim again rests on the supposition that PBS had a financial interest in the ACT III case, and that such interest was affected by whatever action the Commission might take in this proceeding. However, as discussed above, ART has failed to demonstrate how PBS's financial interests could be directly affected by the Commission's grant or denial of Infinity's application to acquire station KRTH(FM). Accordingly, we find that Commissioner Duggan's participation in no way compromised the appearance of complete fairness in the KRTH(FM) proceeding.

Consideration of ART's Filing as an Informal Objection

8. ART argues that the Commission should have treated its earlier filing as a formal petition to deny. We considered it an informal objection because ART failed to supply an affidavit attesting to ART's claim to be a party in interest or to the facts alleged in the pleading as required by the Communications Act. See 47 U.S.C. Section 309(d)(1).

9. On reconsideration, ART asserts that its filing met these requirements because it contained the statement that more than 9,000 of ART's members reside in the greater Los Angeles area, as well as the notarized signature of ART Director, Terry Rakolta. ART further notes that its Consolidated Reply to Infinity and Beasley's oppositions contained an affidavit from an ART member who stated that he lived in KRTH(FM)'s listening area.

10. ART's arguments are unpersuasive. Section 309(d)(1) of the Communications Act of 1934 requires that petitions to deny establish that the petitioner has standing. When a petition is filed by a group, such group must "provide the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf." Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application, 82 FCC 2d 89, 99 (1980). ART's initial "petition" did not meet this standard because Ms. Rakolta does not reside in KRTH(FM)'s listening area and, thus, did not establish

[5] We note that at the time of the decision to grant the application, we had asked for rehearing in the ACT III case but the petition had not yet been granted.

standing. The later inclusion of an affidavit from a listener in ART's reply was untimely and thus inadequate to cure this failure. We therefore correctly treated ART's filing as an informal objection.

Indecency

11. As to ART's argument that Infinity's prior record of indecency violations demonstrates that grant of the instant application would not be in the public interest, Petitioner raises essentially the same arguments here as were raised in its informal objection. We carefully considered those arguments when the informal objection was before us and conclude that they were properly resolved in our February 1, 1994 letter. Reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. See, e.g., Isis Broadcasting Group, 8 FCC Rcd 24 (Rev. Bd. 1992), citing WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

12. Accordingly, IT IS ORDERED that the petition for reconsideration filed March 3, 1994, by Americans for Responsible Television IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

AMSC SUBSIDIARY
CORPORATION File No. 2823-DSE-P/L-93

For a Blanket License to Construct and Operate
up to 200,000 L-Band Mobile Earth Stations

ORDER AND AUTHORIZATION

Adopted: March 13, 1995; Released: March 13, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. With this Order we will permit AMSC Subsidiary Corporation (AMSC) to provide the first voice mobile satellite service by a U.S.-licensed satellite system. Users of the service will be able to access the telephone network from essentially anywhere in the United States as well as from offshore locations. A seamless, nationwide, wireless telephone system will become reality through the availability of AMSC's Mobile-Satellite Service and 200,000 mobile earth terminals (METs).

2. AMSC has filed an application for a blanket license to construct and operate up to 200,000 METs in the L-band spectrum allocated to the Maritime Mobile-Satellite, Aeronautical Mobile-Satellite (R) and Mobile-Satellite Services (MSS) in various parts of the 1530-1559/1626.5-1660.5 MHz band. In response to Public Notice, Report No. DS-1334 (July 21, 1993), Aeronautical Radio, Inc. (ARINC), COMSAT Corporation (Comsat), Loral Qualcomm Satellite Services, Inc. (Loral), Motorola Satellite Communications, Inc. (Motorola), Honeywell, Inc. and the Federal Aviation Administration (FAA) filed comments. We grant AMSC's application, subject to certain technical conditions.

II. BACKGROUND

3. In 1989, the Commission authorized AMSC to construct and operate a mobile satellite system in the upper L-band (1545-1559/1646.5-1660.5 MHz). Because this band is also allocated to the Aeronautical Mobile-Satellite (Route) Service (AMSS(R)), governing safety and regularity of flight, the Commission required the AMSC system to be capable of accommodating aeronautical safety and distress communications on a preemptive basis.[1] In 1993, the Commission authorized AMSC to construct its satellite to be capable of operating in the lower portion of the L-band, as well.[2] The lower portion of L-band is generally defined as 1525-1544/1626.5-1645.5 MHz.[3] The Commission also modified AMSC's satellite authorization to include 1544-1545/1645.5-1646.5 MHz for distress and safety operations. AMSC's application to operate its facilities in the lower L-band remains pending in File No. 59-DSS-MP/ML-93.

4. AMSC now seeks a blanket license for 200,000 METs to be operated with its authorized space segment in the 1545-1559/1646.5-1660.5 MHz band throughout the 48 contiguous states of the United States, Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and U.S. coastal waters up to 200 miles offshore. Authorization and use of these METs, AMSC states, will enable it to lay the foundation for the ultimate success of the MSS industry and to fulfill the terms of its MSS authorization. See Application at pp. 3-4. AMSC also states that its METs will not provide AMSS or AMSS(R).[4] AMSC further asserts that the METs will meet the criteria advanced by National Telecommunications and Information Administration (NTIA) and FAA on the matter of protection of safety and

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[1] See Licensing Order, 4 FCC Rcd 6041 at 6048-49 (1989), Final Decision on Remand, 7 FCC Rcd 266 (1992); aff'd sub nom. Aeronautical Radio, Inc. v FCC, 983 F.2d 75 (1993). We note that AMSC's METs may be authorized for non-AMSS(R) use only. See 4 FCC Rcd at 6056, para. 102.

[2] Memorandum Opinion and Order, 8 FCC Rcd 4040, 4048 (1993).

[3] AMSC was not authorized to construct its satellite to operate in the 1525-1530 MHz segment of the lower L-band.

[4] See AMSC Licensing Order, supra. See also Second Report and Order, 2 FCC Rcd 485 at para. 31 (1987). Further, the Commission issued AMSC land earth station construction authorizations in File Nos. 445-DSE-P/L-94 and 1540-DSE-P/L-94, Public Notice DS-1476 (November 9, 1994).

distress communications, as well as employ sufficient safeguards to comply with Footnotes US308 and 729A to Section 2.106 of the Rules for its proposed operation in the upper L-band.[5]

III. DISCUSSION

5. ARINC, which provides communications for the air transport industry and offers AMSS(R) using Inmarsat, expresses concern that 200,000 METs would pose a threat of interference to ARINC's satellite communication service in the lower portion of L-band, viz., 1626.5-1645.5 MHz. It urges that the METs be made subject to standards to be adopted by the Radio Technical Commission for Aeronautics (RTCA) Special Committee 165 (SC-165), which is setting equipment performance standards in L-band,[6] as well as the standards for METs adopted in the Commission's proceedings. In particular, ARINC alleges that the AMSC proposal does not meet the minimum set of technical standards for "real-time preemptive capability" and for shutting down the MET to accommodate higher priority communications or to stop an interfering transmission. ARINC states that AMSC does not acknowledge the RTCA requirement that an MET shut down within 0.1 second of receiving a command to do so. Also, ARINC alleges that AMSC's proposed limits for spurious and out-of-band emissions may be inadequate to protect the Global Positioning System (GPS) and the Russian Global Navigation Satellite System (GLONASS) which operate on frequencies near L-band. For its part, FAA expresses concern about interference potential among METs as well as to GPS and GLONASS, and recommends certain license conditions. See FAA Letter to FCC, August 20, 1993.[7]

6. COMSAT, concerned that the existing L-band spectrum is already in heavy demand by Inmarsat, the United States, Canada, Mexico and the Russian Federation, asks that AMSC clarify that it is not seeking an additional amount of spectrum that would complicate inter-system coordination. Also, COMSAT asks that the Commission retain jurisdiction over the grant of any authorization to AMSC to ensure that AMSC's operation in the L-band does not interfere with COMSAT's obligation to provide maritime distress and safety, and aeronautical traffic control functions. COMSAT at 4.

7. Loral and Motorola assert that AMSC has authority to operate only in the upper portion of the L-band (1545-1559/1646.5-1660.5 MHz) and therefore cannot be granted MET authority for use of the lower (MSS) portion of the L-band (1530-1544/1626.5-1645.5 MHz). Moreover, Loral notes, AMSC requests authority to construct METs capable of operating in the 1525-1530 MHz band, which has not been allocated in the United States.[8] Further, Loral argues, in order to avoid harmful interference into low earth orbiting mobile satellite systems operating in the 1610-1626.5 MHz band, AMSC's application cannot be granted until technical rules for the 1610-1626.5 MHz band have been established.

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[5] US308 states that in the 1549.5-1558.5/1651-1660 MHz bands the AMSS(R) requirements that cannot be accommodated in the 1545-1549.5 MHz, 1558.5-1559 MHz, 1646.5-1651 MHz and 1660-1660.5 MHz bands shall have priority access with real-time preemptive capability with respect to communications in the MSS. Systems not interoperable with AMSS(R) shall operate on a secondary basis. Account shall be taken of the priority of safety-related communications in the MSS. Note 729A states that, notwithstanding any other provisions of the Radio Regulations relating to restrictions in the use of the bands allocated to AMSS(...) for public correspondence, the bands 1545-1555 MHz and 1646.5-1656.5 MHz may be authorized by administrations for public correspondence with aircraft earth stations. Such communications must cease immediately, if necessary, to permit transmission of messages with priority 1 to 6 in Article 51. Priority 1 includes distress calls, distress messages and distress traffic; priority 2 relates to communications preceded by the urgency signal; priority 3 is communications relating to radio direction-finding; priority 4 is flight safety messages; priority 5 is meteorological messages; and priority 6 is flight regularity messages.

[6] See American Mobile Satellite Corp., 7 FCC Rcd. 942, 945-47 (1992). See also RTCA, Guidance on AMSS End-to-End System Performance (DO-215, May 13, 1993); RTCA, Minimum Operational Standards for AMSS, Part A (DO-210 Part A, June 19, 1992), and Part B (DO-210 Part B, May 13, 1993). RTCA SC-159, WG-6, is currently addressing matters of interference to Global Navigation Satellite Systems by MSS operations.

[7] Honeywell, for its part, supports RTCA and the need to provide protection for GPS and GLONASS.

[8] See AMSC Application, Attachment A to Exhibit 1, at #14.

8. In response to ARINC's allegation regarding technical standards for "real-time preemptive capability," AMSC states that its system meets the standards for protection of AMSS(R) proposed by NTIA and FAA.[9] It claims that its criteria for commanded shut-down, which emphasizes positive verification that shut-down has actually taken place and a back-up procedure if it does not, represents an approach that is superior to an arbitrary 0.1 second standard. As to the issue concerning use of the lower L-band raised by COMSAT, Loral and Motorola, AMSC responds that this should be considered in the context of AMSC's application in File No. 59-DSS-MP/ML-93. In any event, AMSC affirms, it has no intention to operate its METs in the lower L-band unless the Commission grants its space segment application. AMSC argues that producing MET equipment capable of operating in both upper and lower L-band segments preserves flexibility for the future and "is also a matter of administrative convenience for the Commission." Reply at 14. AMSC states that its application does not alter the U.S. system description and characterization of demand and capacity requirements that have been presented in international negotiations. It also states that COMSAT does not submit any evidence that AMSC's METs will interfere unacceptably with the operation of Global Maritime Distress Safety Systems operating in the 1530-1545/1626.5-1645.5 MHz band.

9. Loral submitted a further letter in which it urges that AMSC not be authorized to use METs capable of using the lower L-band frequencies until lower-L band licensing proceeding issues are resolved. Otherwise, Loral argues, there may be prejudgment of those issues. Loral also alleges that authorization of AMSC's METs in the lower L-band would "prejudice coordination with systems licensed in the 1610-1626.5 MHz band," and that AMSC has not resolved out-of-band emission issues.

10. The first issue we must address is the potential for harmful interference to GPS and GLONASS receivers from MSS MET equipment using frequencies adjacent to the GPS and GLONASS bands. Related to this issue is the need to assure that distress and safety communications and AMSS(R) are properly accommodated by MSS systems operating in the 1545-1559/1646.5-1660.5 MHz bands, in compliance with Footnote 729A and the priority and real-time preemption provisions of Footnote US308 in the National Table of Frequency Allocations. See 47 C.F.R. § 2.106.[10]

11. In October 1994, the FCC, NTIA and FAA entered into a Memorandum of Understanding (MOU) to foster coexistence between GPS and GLONASS receivers and MSS METs operating in bands near the frequency bands used by GPS and GLONASS receivers, including METs to be used with AMSC's satellites. The provisions of the MOU establish specific out-of-band emissions limitations and notification requirements in the event of detected harmful interference. We believe that these provisions resolve the issues raised by the parties concerning the potential for harmful interference between GPS and GLONASS receivers and MSS METs operating in bands near the frequency bands used by GPS and GLONASS receivers.

12. Further, the MSS Interagency Working Group jointly chaired by NTIA and the FCC with representatives from NTIA, FCC, FAA and Coast Guard developed a minimum set of capabilities for MET equipment to ensure real-time preemption for safety and distress-related services. See note 9, supra. For example, it is necessary that certain functions be under direct control of the system management process. These direct control functions (e.g., cessation of transmissions under certain conditions) are to be carried out by hardware/software capabilities without operator intervention and are to be performed in a timely fashion with only minimum delay. Additionally, it is required that the priority associated with each transmission and the terminal identification number be provided to the system manager to support the direct control functions. We believe that systems with these capabilities will comply with Footnote 729A and the priority and real-time preemption requirements of Footnote US308. Accordingly, they are included as conditions to this Order.

[9] AMSC cites the letter from NTIA and FAA to the Chief, Common Carrier Bureau, dated January 14, 1993 which sets forth mandatory minimum capabilities of MET equipment to ensure compliance with Footnote 729A and the priority and real-time preemption requirements imposed by Footnote US308. See also NTIA and FAA letter to the Chief, Common Carrier Bureau, dated June 22, 1993.

[10] Compliance with out-of-band emission standards is required under International Telecommunication Union Radio Regulations 301, 305 and 306, as well as our domestic requirement for emissions in Section 25.202 of our Rules, 47 C.F.R. § 25.202(f).

13. We now turn to AMSC's operation of METs capable of operating in the lower portion of L-band.[11] Without attendant authority to use the lower L-band for service, AMSC proceeds *at its own risk* to construct equipment that has capabilities extending beyond its current service authorization. If it wishes to undertake that risk, we see no reason to prevent it from doing so. The marginal expense associated with designing and building METs with synthesizers capable of a one percent enhanced bandwidth is relatively small. Given the need to retrofit all extant METs in the event of any future lower L-band authorization, AMSC should be free to prefer manufacturing equipment capable of the broader bandwidth. We therefore reject commenters' arguments opposing AMSC's authorization to operate METs having a capability that includes the lower L-band.

This MET operating authorization, however, encompasses operation only on the frequencies 1545-1559/1646.5-1660.5 MHz.

14. Environmental Processing. AMSC claims that its application is excluded from the environmental processing requirement of Section 1.1306(b) of the Rules. Its argument is that Note 1 to Section 1.1307(b) of the Rules subjects only Part 25 fixed and portable earth stations that operate at high EIRP levels, and involve a risk of significant RF exposure, to Section 1.1306(b). AMSC asserts that its METs are low power devices, like mobile transmitters operating in Parts 21, 22, 23, 90 and 94 of the Rules, and were excluded in the Second Report and Order in Gen. Docket No. 79-144, 2 FCC Rcd 2064 (1987), Erratum, 2 FCC Rcd 2526 (1987). See AMSC Application at 3. AMSC's argument misapprehends the Commission's Rules as well as the intent of the exclusions contained in the Second Report and Order. Section 1.1307(b), Note 1, clearly subjects Part 25 applicants to the requirement for environmental assessment. AMSC's METs are authorized pursuant to Part 25. Moreover, the language of the Second Report and Order contemplated the exclusion of cellular and fixed communications services up to 800 MHz, based on the absence of evidence of excessive exposure during routine and normal operation of vehicle-mounted antennas.[12] AMSC's antennas do not operate at or below 800 MHz and mobile satellite services generally were not addressed in the Second Report and Order.

15. However, AMSC states that its METs, using mast, disk and helix antennas designed for mounting on various kinds of motor vehicles, will comply with the exposure limits of IEEE/ANSI C95.1-1992 and "will be comparable to or less than the exposure levels that result from vehicle-mounted mobile communications equipment in widespread use." AMSC Comments in ET Docket No. 93-62, Exhibit A.[13] Based on AMSC's showing of compliance with Section 1.1307(b)of the Rules, we find that no Environmental Assessment need be filed for its METs. Nevertheless, in view of the pendency of revised standards for radiofrequency radiation emissions in ET Docket No. 93-62, we will require AMSC to demonstrate compliance with the standards that the Commission adopts in that

[11] We note that use of the 1544-1545/1645.5-1646.5 MHz bands is limited by notes 727A and 734B in Section 2.106 of the Commission's Rules, Table of Frequency Allocations, to distress and safety operations. See also Article N38, Radio Regulations of the ITU; and 8 FCC Rcd at 4046. The METs which AMSC proposes to use for its MSS operations are not compatible with the distress and safety services in the 1544-1545/1645.5-1646.5 MHz bands and therefore will not be authorized for service therein.

[12] See Third Report and Order, GEN. Docket No. 79-144, 3 FCC Rcd 4236 (1988), Erratum, 3 FCC Rcd 5928 (1988) (Amendment of Parts 1 and 80 regarding ship earth stations); Report and Order, GEN. Docket No. 87-551, 3 FCC Rcd 7332 (1988), Erratum, 4 FCC Rcd 1761 (1989) (Amendment of Part 1 regarding FM booster stations); and Report and Order, GEN. Docket No. 88-469, 5 FCC Rcd 385 (1990) (Measurement of localized fields).

[13] See Notice of Proposed Rule Making, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993). See also AMSC letter to FCC dated February 22, 1995, which incorporates AMSC's comments in Docket No. 93-62 in this proceeding, and clarifies power levels into the antennas. AMSC avers that it complies with the ANSI 1992 standard of 1.1 mW/cm^2, which is more stringent than the 1982 Rule standard of 5 mW/cm^2, for its mobile medium gain antennas. However, there is no showing that the mobile high gain antennas described in Attachment A to Exhibit 1 of AMSC's application, or in its comments to ET Docket No. 93-62, comply with these exposure standards. Therefore, our authorization herein will apply only to the medium gain mast, disk, and dome antennas reflected in the application, AMSC comments in ET Docket No. 93-62 and ASMC's letter of February 22, 1995. We further note that the best way to minimize exposure of users and of the public is through proper installation of vehicle-mounted antennas. We expect AMSC to assure such proper installation for all medium gain mast, disk and dome antennas.

proceeding.[14]

IV. CONCLUSION

16. Our authorization to AMSC to construct and operate up to 200,000 METs will allow the first voice mobile satellite service by a U.S.-licensed satellite system. Users will be able to access the telephone network from essentially anywhere in the United States as well as from offshore locations. A seamless, nationwide, wireless nationwide telephone system will become reality through the availability of AMSC's Mobile-Satellite Service and METs. We find that pursuant to Sections 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 309 and 319, that the public interest will be served by granting AMSC its request to construct and operate up to 200,000 METs.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Section 0.261 of the Commission's rules on delegation of authority, 47 C.F.R. § 0.261, application File No. 2823-DSE-P/L-93 IS GRANTED and AMSC Subsidiary, Inc. IS AUTHORIZED to construct and operate up to 200,000 mobile earth terminals throughout the 48 Contiguous States of the United States, Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and the United States' coastal waters up to 200 miles offshore.

18. IT IS FURTHER ORDERED that AMSC's mobile earth terminals (METs), operating with the Mobile Satellite Service in the 1545-1559/1646.5-1660.5 MHz bands and using the medium gain antennas discussed herein, shall have the following minimum set of capabilities to ensure compliance with Footnote 729A and the priority and real-time preemption requirements imposed by Footnote US308 in Section 2.106 of the Rules, 47 C.F.R. § 2.106:

1. All MET transmissions shall have a priority assigned to them that preserves the priority and preemptive access given to aeronautical distress and safety-related communications sharing the band;

2. Each MET with a requirement to handle distress and safety-related communications shall be capable of recognizing message and call priority identification when transmitted from its associated Land Earth Station;

3. Each MET shall be assigned a unique technical identification number that will be transmitted upon any attempt to gain access to a system;

4. After an MET has gained access to a system, the mobile terminal shall be under control of a Land Earth Station and shall obtain all channel assignments from it;

5. All METs that do not continuously monitor a separate signalling channel shall have provision for signalling within the communications channel;

6. Each MET shall automatically inhibit its transmissions if it is not correctly receiving a separate signalling channel or signalling within the communications channel from its associated Land Earth Station;

7. Each MET shall automatically inhibit its transmissions on any or all channels upon receiving a channel-shut-off command on a signalling or communications channel it is receiving from its associated Land Earth Station; and

8. Each MET with a requirement to handle distress and safety-related communication shall have the capability within the station to automatically preempt lower precedence traffic.

19. IT IS FURTHER ORDERED that AMSC's METs are subject to any subsequent Commission decisions that may be issued in response to RTCA reports or recommendations concerning out-of-band emissions affecting Global Navigation Satellite Systems (GNSS). Pending such decisions, AMSC shall terminate interfering operations immediately upon notification by the FCC or NTIA, as appropriate, of harmful interference to GNSS.

[14] We will require AMSC to comply with the applicable radiofrequency exposure guidelines as set forth in any future Report and Order in ET Docket No. 93-62. We will also require AMSC to demonstrate compliance with the guidelines contained in the First Report and Order in ET Docket No. 93-62 within 60 days of the effective date of that First Report and Order.

20. IT IS FURTHER ORDERED that AMSC's METs are subject to the applicable radiofrequency exposure guidelines as set forth in any future Report and Order in ET Docket No. 93-62. AMSC shall demonstrate compliance with the guidelines contained in the First Report and Order in ET Docket No. 93-62 within 60 days of the effective date of that First Report and Order.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CORRECTION
(Released March 23,1995)

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BOCS' COMPARABLY EFFICIENT INTERCONNECTION PLANS AND AMENDED PLANS FOR ENHANCED SERVICES

Released: March 21, 1995

Recently, the United States Court of Appeals for the Ninth Circuit partially remanded to the Commission the BOC Safeguards Order. In response to this decision, the Common Carrier Bureau issued an order permitting the BOCs to continue, pending further proceedings, to provide existing enhanced services pursuant to approved comparably efficient interconnection (CEI) plans. The order, however, required that the BOCs file amendments to their approved CEI plans if any new basic services are used to provide those enhanced services or major changes are made in the enhanced services approved in specific CEI plans. The order also required the BOCs to file CEI plans for enhanced services currently provided to customers but not covered by existing CEI plans. The BOCs must also file CEI plans for new enhanced services that they propose to offer. See In the Matter of Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36, (Comm. Car. Bur. released Jan. 11, 1995).

On March 13, 1995, the BOCs filed amended and new CEI plans listed below.

Ameritech
1. Facsimile Store and Forward Service
2. Fast Packet Data Services
3. Interactive Voice Response Services
4. Internet Access Service
5. Voice Mail Messaging Service

BellSouth
1. Gateway Services
2. Synchronous Protocol Processing Services
3. Voice Messaging Services

Bell Atlantic
1. Protocol Processing Services

NYNEX
1. Electronic Information Services
2. Voice Messaging Services (Amendment)

Pacific Bell
1. Enhanced Protocol, Code, and Format Conversion Service
2. Facsimile (Fax) Store and Forward Services
3. Electronic Messaging Services (Amendment)
4. Videotex Gateway Service (Amendment)
5. Voice Mail Service (Amendment)
6. Voice Store and Forward Services (Amendment)

SWBT
1. Payment Processing Services
2. Protocol Conversion Services (Amendment)
3. Voice Messaging Services (Amendment)

US West
1. Audiotex Services
2. Electronic Messaging Services
3. Enhanced Facsimile Services
4. On-Line Database Access Services
5. Protocol Processing Services (Amendment)
6. Voice Messaging Service (Amendment)

All amendments to existing CEI plans will be deemed approved 90 days after the issuance of this Public Notice, unless the Common Carrier Bureau, prior to the expiration of the 90-day period, informs the relevant BOC that the amendment will not be deemed approved.

Interested parties should file comments on the plans and amendments by **May 1, 1995**, and reply comments by **May 22, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W.,

Washington,D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the plans and amendments can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Harron Communications Corp.
Town of Rockland, Massachusetts
CUID No. MA0224
Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: March 22, 1995

By the Deputy Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Harron Communications Corp. ("Operator") was charging for its cable programming service ("CPS") tier in Rockland, Massachusetts, CUID No. MA0224. Operator has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. See para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

Procedural Matters

4. The first valid CPS complaint was completed and served on Operator on February 25, 1994. The Commission received the complaint on February 28, 1994.

5. Operator filed an FCC Form 393 in response to the rate complaint; Operator also filed an amended Form 393 on February 7, 1995.[11]

Discussion

6. In its amended benchmark filing of February 7, 1995, Operator calculated a maximum permitted price for the CPS tier of $10.10 per month. However, Operator's actual price for the CPS tier was $10.12 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's FCC Form 393, as amended, we have found the following error that impacts the maximum permitted price:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not report any income tax expense. Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[12] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculate Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.515% of Operator's return on investment.

Conclusions

7. Upon review of the record herein, and having incorporated the adjustment discussed above,[14] we conclude that Operator's showing supports a maximum reasonable CPS tier price of $9.94 per month (plus franchise fee) for the period February 28, 1994 to May 14, 1994.[15] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] *See* Operator's filing on FCC Form 1205, page 1 (August 15, 1994).

[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n. 92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should
be calculated based upon a pre-tax return on investment.")

[14] This adjustment has the effect of causing Operator to calculate its permitted rates from Form 393, Part II, Worksheet 2 rather than Worksheet 1. However, Operator failed to complete Worksheet 2 of Form 393. Therefore, we have computed Worksheet 2 by using data supplied by Operator on its Form 1200 filing.

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. We further conclude that Operator must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Operator's price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994 upon completion of our review of Operator's FCC Form 1200 rate filing.

9. We further conclude that Operator has submitted in good faith a timely optional supplemental filing in response to our *Public Notice*. As provided in the *Public Notice*, we will relieve Operator of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 25, 1994 complaint against the cable programming service price charged by Harron Communications Corp. in Rockland, Massachusetts, CUID No. MA0224, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Harron Communications Corp. with respect to Rockland, Massachusetts, CUID No. MA0224, for the period of February 28, 1994 to May 14, 1994, justifies a maximum price of $9.94 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Harron Communications Corp. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Rockland, Massachusetts, CUID No. MA0224, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that Harron Communications Corp. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Harron Communications Corp. shall not be required to obtain advance approval of adjustments to its CPS price in Rockland, Massachusetts, CUID No. MA0224, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[16] We reviewed Operator's FCC Form 1200 rate filing and confirmed that Operator calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Sonic Cable Television of Northern California
CA0991 Livingston, CA

Triax Cablevision USA, L.P.
VA0004 Pound, VA

Caguas-Humacao Cable Systems
PR0060 Humacao, PR

Mountain Brook Cablevision, Inc.
AL0086 Mountain Brook, AL

Motions to Dismiss Complaints
Concerning Cable Services Rates

ORDER

Adopted: March 21, 1995; Released: March 24, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we grant several motions to dismiss complaints on the grounds that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for cable programming services (CPS) only, and then only upon filing of a valid complaint. Our review reveals that the complaints listed at Attachment A below, while asserting that they challenge CPS rates, either challenge only rates for basic services, not CPS, or raise other issues (timeliness, residence of complainant within community) that warrant their dismissal. These complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. When only basic rates, or rates or practices concerning basic service and equipment, are being challenged, the complaint should properly be brought to the attention of the local franchise authority in the first instance, and not filed with this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that the motions to dismiss considered herein ARE GRANTED to the extent discussed above.

4. IT IS FURTHER ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended,, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints listed in Appendix A hereto ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Attachment A

Complaints Dismissed by this Order

Cable Operator	CUID No., Community	Issue Raised
Sonic Cable Television of Northern California	CA0991 Livingston	charge for additional outlets
Triax Cablevision USA, L.P	VA0004 Pound	complainant does not reside in community
Caguas-Humacao Cable Systems	PR0060 Humacao	basic tier only
Mountain Brook Cablevision, Inc.	AL0086 Mountain Brook	untimely

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	Barkhamsted, CT Colebrook, CT
PEGASUS COMMUNICATIONS, L.P. D/B/A PEGASUS CABLE TELEVISION	Goshen, CT Harwinton, CT New Hartford, CT West Hartland, CT Winchester, CT

Petition for Stay of Local
Rate Orders of the State of Connecticut
Department of Public Utility Control

ORDER

Adopted: March 21, 1995; Released: March 22, 1995

By the Chief, Cable Services Bureau:

I. Introduction

1. On December 23, 1994, Pegasus Communications, L.P., d/b/a Pegasus Cable Television ("Pegasus") timely filed an Emergency Petition for Stay and Request for Ex Parte Disposition of rate orders of the State of Connecticut Department of Public Utility Control ("DPUC"). Pegasus is subject to two local cable rate orders issued by the DPUC. The local rate orders were issued by the DPUC on November 28, 1994.[1]

2. The DPUC's local rate orders address the rates Pegasus charged for basic cable service, associated equipment and installations for the period of time from September 1, 1993 to May 15, 1994 ("Phase I"), and the period subsequent to May 15, 1994 ("Phase II").[2] In the DPUC rate proceedings, Pegasus elected to use the cost of service approach in order to justify its rates.

3. The DPUC conducted extensive cost of service proceedings and issued two comprehensive decisions. In the decisions at issue here, the DPUC found that Pegasus' basic service rates exceeded the company's costs, and ordered the company to reduce its rates and refund to subscribers the overcharges levied since September 1, 1993. Pegasus states that the DPUC's local rate orders could require Pegasus to refund approximately $141,000 for the period of time beginning September 1, 1993.[3] Pegasus seeks a stay of the local rate orders pending the resolution of its Appeal on the merits. The DPUC has not filed an opposition to Pegasus' stay request.

II. Standard of Review

4. The Commission evaluates petitions for stays under well-settled principles. To support a stay, a petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the granting of a stay.[4] As discussed below, resolution of this stay petition centers primarily on the strength of Pegasus' argument regarding the third prong of this test.

III. Discussion

5. The Commission's rules permit operators to implement refunds in either of the following methods: (1) by returning overcharges directly to those subscribers who actually paid the overcharges; or (2) by means of a prospective percentage reduction in the rates for the basic service tier or associated equipment for current subscribers via a specifically identified, one-time credit.[5]

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[1] On December 23, 1994, Pegasus also filed a Petition for Review ("Appeal") of the DPUC's local rate orders.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] Petition for Stay at 21.

[4] See Wisconsin Gas Co. v. FERC, 758 F. 2d 669, 673-74 (D.C. Cir. 1985) (per curiam); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[5] 47 C.F.R. §76.942(d).

Thus, the Commission's rules are structured so that individuals who were actually overcharged might not receive refunds in the future. Thus, a delay in the implementation of the refunds owed by Pegasus will not harm any interested party, since if Pegasus must implement refunds, it can choose to do so by way of credits to the then-current class of subscribers.

6. A stay of the local rate orders would prevent Pegasus from being subjected to the irreparable economic harm it would face by issuing refunds to subscribers that it could not later recoup. Accordingly, given our findings herein, and the fact that the DPUC has not opposed Pegasus' Petition for Stay, we will grant Pegasus' request that the DPUC orders in the above-referenced proceedings be stayed pending our full review of this case on the merits. During the period of this stay, Pegasus must deposit in an interest-bearing escrow account the total amount of money that the DPUC has ordered Pegasus to refund to its customers. Alternatively, Pegasus may elect to post a bond for the benefit of the DPUC. The amount of the bond shall be the total amount of money that the DPUC has ordered Pegasus to refund to its customers, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Pegasus is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the DPUC, on behalf of Pegasus' subscribers.

IV. Ordering Clauses

7. Accordingly, **IT IS ORDERED** that the Petition for Stay filed by Pegasus is **GRANTED** pending the resolution of Pegasus' Appeal on the merits.

8. **IT IS FURTHER ORDERED** that the total amount of money that the DPUC has ordered Pegasus to refund to its customers **SHALL BE PLACED** by Pegasus in an interest-bearing escrow account, **OR SHALL BE SECURED** by the posting of a bond for the benefit of the DPUC for the total amount of money that the DPUC has ordered Pegasus to refund to its customers, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Pegasus' compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate for tax refunds and additional tax payments.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID Nos. CA0205 (Redwood City)
and CA0207 (San Carlos)

TCI Cablevision of San Jose

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1995; Released: April 4, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 18, 1994.

5. In its amended benchmark filing of May 18, 1994, Operator calculated a maximum permitted price for the CPS tier of $8.83 per month. However, Operator's actual price for the CPS tier was $10.28 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393s, Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operator used in justifying its rates for the franchise areas under consideration in this Order, of 1.034.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $8.78 (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Operator in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded $8.78 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	DateComplaint Served
CA0205	2/28/94	2/25/94
CA0207	2/28/94	2/28/94

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
CUID No. WY0089 (Marbleton, WY)

Vantage Cable Associates, L.P.

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1995; Released: May 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss the complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concern a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the community referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. OH0291 (Delaware)

Warner Cable

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The complaint was completed and served on Operator on February 25, 1994 and received by the Commission on February 28, 1994. Operator filed FCC Form 393 in response on May 16, 1994. Operator amended its justification on April 25, 1995 in response to a Commission letter which requested clarification of Operator's showing.[11]

5. Operator asserts that its monthly CPS tier price is justified by its benchmark filing because its price is lower than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

In its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of September 1993. However, the figures Operator used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Operator used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on December 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. Operator's calculation of the Inflation Adjustment Factor is thus incorrect.

We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Operator filed. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier price of $12.11 (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[12] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to herein against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to $12.11 (plus franchise fee).[13]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* letter from Peter G. Wolfe, FCC, to Gary Matz, Time Warner (Apr. 18, 1995).

[12] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. WI0234 (Green Bay)

Warner Cable

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 4, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The complaint was completed and served on Operator on October 26, 1993[11] and received by the Commission on November 1, 1993. Operator filed FCC Form 393 in response.

5. Operator asserts that its monthly CPS tier price of $12.67 is justified by its benchmark filing because its price is lower than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> In its Form 393 filing, Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of November 1994 using data released by the U.S. Department of Commerce on March 31, 1994. However, Operator's use of November 1994 as the date through which it calculated the inflation adjustment is impermissible. Based on the service date of the complaint, Operator was required to file a justification of its CPS price for the Green Bay franchise area no later than November 26, 1993.[12] If Operator had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[13] We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator should have filed.[14] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier price of $12.33 (plus franchise fee) for the period from November 1, 1993 to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to herein against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8 IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. §

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator claims that it did not receive a copy of the complaint in October 1993. However, the complainant certified on FCC Form 329 that he mailed a copy to Operator on October 26, 1993. Under these circumstances, we will consider October 26, 1993 as the service date for the purposes of calculating the inflation adjustment, but we will not consider imposing penalties for failing to respond to the complaint in a timely manner.

[12] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[13] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

76.961, that Operator shall refund to subscribers in the community referenced in the caption that portion of the amounts paid for cable programming service for the period from November 1, 1993[16] to May 14, 1994 which exceeded $12.33 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $12.33 (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

TELENOIS, INC.

Appeal of the Local Rate
Order of the Village of
Schaumburg, Illinois

ORDER

Adopted: May 1, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 15, 1994, Telenois, Inc. ("Telenois"), the franchisee in the above matter, filed an Appeal of Local Rate Order adopted on November 15, 1994 by its local franchising authority, the Village of Schaumburg, Illinois ("the Village"). The Village opposes Telenois' appeal.[1] The Rate Order establishes a new regulated rate schedule for Telenois' basic service tier rates and associated equipment.[2] Specifically, the Village's Rate Order requires Telenois to implement certain rate reductions and to issue refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through May 15, 1994.

2. In its review of Telenois' Form 393, the Village approved Telenois' permitted rates for some equipment and installations, but ordered Telenois to keep its rates for its basic service tier, converter boxes and remote controls at the current levels, rather than at the higher, maximum permitted levels. Telenois argues that because of this misapplication of the Commission's rate regulations, the Village has improperly reduced Telenois' regulated revenues by setting its rates for basic service tier, converter boxes and remote controls below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. Telenois argues that it should be permitted to offset its refund liability for certain equipment and installation rates with its undercharges for its basic service tier, converter boxes and remote control rates. Telenois further contends that the Village compounded its mistake by setting some of Telenois' rates below the actual rates to reflect any discount or promotional rates that Telenois occasionally charged. Finally, Telenois contends that the Village improperly regulated rates for certain types of equipment, A/B switches, VCR connections and equipment used to receive Digital Music Express ("DMX") and FM radio services from Telenois, which Telenois argues are not subject to regulation. We address each issue in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the

[1] The City filed its opposition on February 1, 1995, well past the deadline under our rules for such a filing. 47 C.F.R. § 76.944(b) (1993). We will not accept late-filed pleadings unless the filer can meet our stringent good cause standard. *See* Meredith/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841 (1994). Since the Village has not shown good cause for the late-filing of its opposition, we will not accept the pleading. We note that nothing in the Village's late-filed opposition would change the determination made herein.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

[3] *See* 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

A. Refund Offsets

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Furthermore, a franchising authority should not require an operator that has promotional offerings for equipment and installations to set any of those rates below its maximum permitted rates.[9] Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[10] In this proceeding, the Village only disputed the validity of Telenois' number of addressable converter boxes in service, an issue Telenois does not contest on appeal. Otherwise, the Village did not dispute the figures used in Telenois' Form 393 or the accuracy of the calculations in the form. Therefore, the

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[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994) ("*Benchmark Order*"), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[9] *See Rate Order*, 8 FCC Rcd at 5818-21.

[10] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

Village should allow Telenois to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[11] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[12] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review.[13] In this proceeding, any refunds to be paid by Telenois should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[14] For instance, in this case, the Village may not order Telenois to set its basic service tier, converter and remote rates below maximum permitted levels. Further, the Village must offset or reduce any refunds it may order by the difference between the actual rates that Telenois charged and the maximum permitted rates that it could have charged during the applicable period of review.[15] According to Telenois' uncontested submission, the Village has directed Telenois to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels.[16] We are remanding this case to the Village so that it can reconsider its ruling in a manner consistent with our findings.[17]

B. Regulatory Status of Equipment/Installations

9. Telenois next contends that the Village improperly set rates for certain equipment that Telenois claims is nonregulated. Specifically, the Village established rates for A/B switches, VCR connections performed by Telenois employees, and for equipment to receive DMX (a music service) and FM radio services provided by Telenois through its cable system. Telenois argues that this equipment is not properly subject to regulation by the Village because it is used by subscribers only to receive off-the-air broadcasts, and to record (not receive) basic cable programming and radio signals and is not used for the reception of its basic tier service.

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[11] *See* 47 C.F.R. § 76.942 (1993).

[12] *See Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[13] While a franchising authority may not require an operator to set its rates below its maximum permitted rates, an operator may not recover the cost of promotions by increasing other equipment rates or by reducing its refund liability. *See Rate Order*, 8 FCC Rcd at 5820-21; United Cable Television of California, Inc. (Davis, California), DA 95-784 (Cab. Serv. Bur., released April 12, 1995). In other words, here, Telenois must calculate its refund liability based solely on its actual, published rates for the period under review, without regard to promotional discounts.

[14] *See Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[15] *See Third Recon. Order*, 9 FCC Rcd at 4353.

[16] We note, however, that operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. *See* Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981, 1982 (1994).

[17] *See* TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY), DA 94-1479 (released December 14, 1994).

10. We have previously held that A/B switches and equipment used to receive DMX and FM radio services are not devices directly related to the delivery of basic cable service and that therefore their price should remain unregulated.[18] Regulated equipment consists of equipment in the subscriber's home that is used to receive regulated cable service.[19] A/B switches are used by subscribers to switch off cable services and to receive, instead, over-the-air broadcast signals. Likewise, the audio equipment is used only by subscribers who choose to receive music and radio services, not basic cable, from their cable operator Since the switches and audio equipment are not "equipment used by subscribers to receive the basic service tier" within the meaning of Section 3(b)(3) of the 1992 Cable Act,[20] their price is not subject to regulation.

11. We disagree with Telenois, however, that the regulatory treatment accorded to A/B switches and audio equipment should be accorded to VCR installations as well. We have previously held that, since VCRs are used "to receive the basic service tier," they are subject to our rate regulations.[21] Telenois established two different charges to install a subscriber's VCR by connecting the VCR to the subscriber's cable service. One charge applied to the operator's installation of the VCR during the subscriber's initial installation of cable service. A second, higher charge applied to the operator's installation of the subscriber's VCR if a separate trip by a cable technician was required. The 1992 Cable Act directed us to establish rate standards for "installation and lease of equipment used to receive the basic service tier."[22] Our rules provide that regulated equipment consists of all equipment in a subscriber's home used to receive basic service.[23] Rates for installation of such equipment must be based on actual costs and must be "unbundled" or priced separately.[24] When basic service is installed through a subscriber's VCR, the VCR is used "to receive the basic service tier."[25] Since VCRs are, indeed, used "to receive the basic service tier," Telenois' charges for VCR installations are subject to our rate regulations. Those charges must comport with the actual cost standard of our rules. Telenois' appeal on this issue is therefore remanded to the Village for further proceedings consistent with this order.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that Telenois, Inc.'s appeal of the Village of Schaumburg's local Rate Order **IS REMANDED** to the local franchising authority for resolution in accordance with the terms of this Order.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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18 *See* TCI of Northern New Jersey, DA 95-25, ¶ 9 (Cab. Serv. Bur., released January 10, 1995) (A/B switches); SBC Media Ventures (Montgomery County, MD), DA 94-1251, 9 FCC Rcd 7175, 7180 (Cab. Serv. Bur. 1994) (A/B switches); TCI Cablevision of Colorado (Boulder, CO), DA 94-1606, ¶ 11 (Cab. Serv. Bur., released December 28, 1994) (A/B switches and equipment to receive DMX and FM radio services).

19 *See* 47 C.F.R. § 76.923(a) (1993).

20 *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

21 *See* TCI of Northern New Jersey at ¶ 10.

22 *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3). *See also* 47 C.F.R. § 76.923(a).

23 47 C.F.R. § 76.923(a).

24 47 C.F.R. § 76.923(b). *See also Report and Order*, 8 FCC Rcd at 5810 ("[W]e will require separate charges for each significantly different type of . . . installation.").

25 *Rate Order*, 8 FCC Rcd at 5810.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. TX0181 (Laredo)

Paragon Cable

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1995 Released: May 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the community designated above. Operator has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The complaint was completed and served on Operator and received by the Commission on February 28, 1994. Operator filed FCC Form 393 on March 9, 1995 in response. Operator further amended its justification on April 6, 1995 and April 17, 1995, in response to Commission letters which requested clarification of Operator's showing.[11]

5. On April 20, 1995, Operator filed a motion to dismiss the complaint. Operator asserts that it did not receive the complaint from the complainant and was not aware of the complaint until it was brought to its attention by a Commission staff attorney. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. The complainant certified on FCC Form 329 that he mailed a copy to Operator on February 28, 1994. Although Operator asserts that it did not receive a copy of the complaint at that time, under our rules service is complete upon mailing.[12] We will therefore consider February 28, 1994 as the date of service, but we will not consider imposing penalties on Operator for failing to respond to the complaint in a timely manner.

6. Operator asserts that its monthly CPS tier prices are justified by its benchmark filing because its prices are equal to the maximum permitted charges as calculated in the filing. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In its Form 393 filing, Part I, Operator sets forth $9.82 as its current rate as of the initial date of regulation for the first cable programming service tier (Tier 2) excluding franchise fees and $4.13 as its current rate for the second cable programming service tier (Tier 3) excluding franchise fees. However, on Worksheet 1 of Part II, Operator sets forth $8.15 as its current monthly charge for Tier 2 and $3.81 as its current monthly charge for Tier 3. The rates set forth in Part I are consistent with the charges which appear on Operator's rate card. Apparently, on Worksheet 1 Operator incorrectly entered its rates that were in effect prior to September 1, 1993. This conclusion is supported by the fact that the rates Operator entered on Worksheet 1 are the same as the rates as of September 30, 1992 that it entered on Part II, Worksheet 2. Therefore, we have adjusted Operator's Form 393 to reflect charges of $9.82 for Tier 2 and $4.13 for Tier 3. This adjustment increases the base rate per channel on Worksheet 1.

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] See letter from Peter G. Wolfe, FCC, to Steven Horvitz, counsel for Paragon (Mar. 27, 1995); letter from Peter G. Wolfe, FCC, to Steven Horvitz, counsel for Paragon (Apr. 11, 1995).

[12] 47 C.F.R. § 76.956(a).

[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

c. In calculating its Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, Operator did not rely on the most currently available data released by the U.S. Department of Commerce.[14] Instead, Operator calculated its inflation adjustment through October 1993 using data released on November 25, 1992 for the third quarter of 1992 (Line 123) and on May 28, 1993 for the first quarter of 1993 (Lines 122 and 125). We therefore must recalculate Operator's Inflation Adjustment Factor using the most accurate data currently available for the date for which Operator filed.[15] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP- PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix A (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[16] However, we further determine that the total overcharge per subscriber is de minimis. Therefore, it would not serve the public interest to order a refund.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the Operator's motion to dismiss the complaint referenced herein IS DENIED.

9. IT IS FURTHER ORDERED that the complaint referred to herein against the cable programming service prices charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

10 IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charges per tier as of March 31, 1994 to $9.72 (plus franchise fee) for Tier 2 (Line A6b) and to $4.09 (plus franchise fee) for Tier 3 (Line A6c).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

Appendix A

CUID No.	Tier	Actual Rates	Maximum Permitted Rates
TX0181	2	$9.82	$9.72
	3	$4.13	$4.09

[14] *See* Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393, Q and A No. 10 (released July 30, 1993) ("The most recent (as of the completion date of the form) GNP-PI numbers available to the public should be used").

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re

Continental Satellite Corporation

Application for Consent to Assignment of Construction Permit for a New Direct Broadcast Satellite System — File No. DBS 87-01

ORDER

Adopted: May 2, 1995 **Released: May 2, 1995**

By the Chief, International Bureau:

1. By this Order, we rescind the authorization conditionally granted to Continental Satellite Corporation ("CSC") to assign its direct broadcast satellite ("DBS") construction permit to Nevada Direct Broadcasting System, Inc. ("Nevada DBS").[1] Authorization to transfer the construction permit from CSC to Nevada DBS was made without prejudice to the outcome of a then-pending arbitration proceeding between CSC and Loral Aerospace Holdings, Inc. ("Loral"), and was explicitly conditioned "upon whatever action the Commission may consider necessary and appropriate as a result of the final determination in that arbitration proceeding." The final determination in that proceeding has now been made, and as a result CSC is under court order to sign an application for Commission approval of transfer of control of the company to Loral, and to transfer 51 percent of its stock to Loral in the event the Commission grants that application. Because the purpose of the arbitration order would be thwarted unless CSC holds the construction permit at issue, we will grant Loral's request and rescind the consent to assignment. Our resolution of this issue renders moot a separate petition filed by Rainbow Programming Holdings, Inc. ("Rainbow") seeking revocation of the transfer because it was allegedly procured by fraud.

[1] At the time of the application and the transfer, Nevada DBS was a Nevada corporation known as Continental Satellite Corporation. CSC is a California corporation of the same name. For ease of reference, we shall use Nevada DBS herein to refer to its predecessor as well.

Background

A. Loral's Claim

2. In July 1990, CSC contracted with Ford Aerospace Corporation ("Ford"), the predecessor to Loral, for the construction of a DBS satellite. In October 1990, CSC and Ford entered into a Memorandum of Understanding ("MOU") that granted Ford a right to waive certain payments under the contract in exchange for unilateral options to acquire 51 percent of CSC's stock. Pursuant to this MOU, Loral (or its predecessors in interest) duly waived the payments by CSC and obtained fully paid-up options to acquire 51 percent of CSC's stock.

3. In October 1992, Loral notified CSC that it was exercising those options, subject to Commission approval of the transfer of a controlling interest in CSC. Loral then sought CSC's cooperation in applying to the Commission for consent to the transaction. CSC refused to execute the application for transfer of control. In December 1992, Loral initiated a lawsuit in California state court seeking specific performance of the option transfer. The matter was thereafter referred to an arbitrator, and was heard from January 31, 1994 to February 4, 1994.

4. Apparently without notifying Loral, on December 15, 1993, CSC applied to the Commission for consent to assign its primary asset, the DBS construction permit, to Nevada DBS, a newly-formed corporation owned by CSC's principals.[2] Shortly after learning of the application in the course of the arbitration hearings, Loral filed Comments in which it asked the Commission to defer its decision on the assignment application until the arbitration proceeding had been concluded.[3] On February 25, 1994, CSC filed a Response to Loral's Comments, asserting that the requested deferral would conflict with the Commission's consistent position that an otherwise qualified applicant

[2] According to the Agreement for Sale and Assignment attached to CSC's assignment application, Nevada was to pay $10,000 at closing of the transfer, and the remainder of the unspecified purchase price after the satellites are accepted in orbit, or January 1, 1999, whichever comes first.

[3] See Comments of Loral Aerospace Holdings, Inc. (Feb. 8, 1994).

need not await the outcome of pending litigation, but rather may be given a grant conditioned upon the outcome of the pending action.[4]

5. On April 6, 1994, the Commission granted the transfer from CSC to Nevada DBS, subject to the following condition:

> This grant is without prejudice to the outcome of pending arbitration proceedings between assignee [CSC] and [Loral]; further, this grant is conditioned upon whatever action the Commission may deem necessary and appropriate as a result of the final determination in that arbitration proceeding.

(File No. DBS-87-01/93-06ACP). In a letter to Loral explaining its decision, the Commission referred to the same consistent practice of granting a conditional consent without prejudice to ongoing contractual disputes that CSC had cited in its reply.[5] The transfer was consummated on April 7, 1994.

6. By Order dated May 11, 1994, the arbitrator held that Loral had validly exercised its options, and therefore found in favor of Loral on its claim for specific performance. Accordingly, he ordered CSC "to execute the Application for Consent to Transfer of Control," which CSC had previously refused to execute, and all "additional documents that are customary, necessary and reasonable in conjunction with submission of the Application to, and the obtaining of, FCC approval."[6] A California Superior Court confirmed the arbitration award on July 21, 1994, and entered judgment thereon.[7] CSC's appeal of that judgment was dismissed on November 3, 1994, making final the judgment in favor of Loral.[8]

7. On November 15, 1994, Loral submitted the arbitrator's final order to the Commission, and requested that the conditional grant of authority to transfer CSC's DBS construction permit be rescinded due to CSC's alleged avoidance of its contractual duties to Loral and the resulting delay in the implementation of its DBS system. In a letter response dated november 30, 1994, CSC argued that because neither the arbitrator nor the court was asked to find or did find that the assignment from CSC to Nevada DBS was improper or should be set aside, no event had occurred triggering the condition to the assignment grant. By letter dated December 12, 1994, Loral responded to CSC's letter, asserting that the arbitrator had "essentially" determined that Loral had a right to 51 percent of the firm holding the DBS construction permit, CSC's principal asset prior to its transfer, and that accepting CSC's argument would be tantamount to approving a fraudulent conveyance.

B. Rainbow's Claim

8. In April 1992, Rainbow entered into an agreement with CSC under which Rainbow purchased an option to either lease CSC's DBS channel capacity or take an outright assignment of its DBS construction permit subject to approval by the Commission. The legality of that agreement is currently the subject of a request for declaratory ruling filed by CSC.[9] In its Petition to Revoke, Rainbow alleges that CSC transferred its construction permit to Nevada DBS in April 1994 in order to escape its contractual obligation under its agreement with Rainbow. It therefore contends that the consent to assignment of that permit was procured by or tainted by fraud, and that the Commission can and should set that consent aside. CSC responded by

[4] See Response of Continental Satellite Corporation to "Comments of Loral Aerospace Holdings, Inc." (Feb. 25, 1194) at 3 (citing Sonderling Broadcasting Co., 46 R.R.2d 889, 894 (1979)).

[5] See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, to Loral Aerospace Holdings, Inc. (Apr. 6, 1994).

[6] See Award of Arbitration (Case No. 727539, Santa Clara County Sup. Ct., May 11, 1994) at 2.

[7] See Order on Petition to Confirm Arbitration Award and for Entry of Judgment (Case No. 727539, Santa Clara County Sup. Ct., Jul. 21, 1994).

[8] See Loral Aerospace Holdings, Inc. v. Continental Satellite Corporation (Case No. H013145, Cal. Ct. App., Sixth Dist., Nov. 3, 1994).

[9] See Request of Continental Satellite Corporation for Declaratory Ruling (File No. DBS 87-01, July 26, 1993).

filing a Motion to Strike, in which it argued that the relief sought by Rainbow was both beyond the Commission's power to grant, and was in any event unjustified because CSC had committed no fraud. Rainbow reasserted its fraud theory in an Opposition to the Motion to Strike, and CSC thereafter filed a Motion to Strike that Opposition.

Discussion

9. We reject CSC's argument that no event has occurred triggering the condition to the assignment grant. In effect, CSC has sought and obtained a conditional authorization to assign its primary asset in the course of a proceeding in which a majority share of the ownership of that asset was at issue. The Commission granted consent in a manner specifically designed to allow the assignment to be undone if warranted by the outcome of the arbitration. There was no suggestion -- let alone a requirement, as CSC argues -- that the condition could only be triggered by a judicial finding that the assignment was fraudulent or otherwise improper. As even CSC admits, the relevant proceeding has reached a final determination.[10] A vital part of that final determination is an order compelling CSC to cooperate with Loral in seeking authorization from the Commission for transfer of control over CSC to Loral. Such authorization would not be necessary unless CSC were a Commission licensee -- a fact that is a major premise of the arbitration order. Allowing the transfer to Nevada DBS to stand would severely prejudice the outcome of the arbitration, in direct contravention of the first condition of the grant, and would also be inconsistent with what we deem to be "necessary and appropriate" in light of the final resolution of the arbitration proceeding. Nothing more is required to trigger the condition of the assignment grant.

10. Moreover, in light of the circumstances of this case, we find CSC's argument highly disingenuous. In order to convince the Commission to authorize the transfer despite the pending arbitration proceeding, CSC argued that there was no reason for delay since the grant could be conditioned on the outcome of that proceeding and there was no allegation that CSC would not abide by the arbitrator's determination. Now that the arbitrator has issued a decision adverse to CSC, it argues that the Commission is powerless to exercise the condition in the grant and restore the status quo necessary to effectuate the arbitrator's order. In the process, CSC has completely reversed its assertions as to the nature of the conditional grant conferred by the Commission. We are not impressed by such sharp practices. In fact, CSC's conduct teeters perilously close to a failure to conform to the ethical standards we expect from practitioners before the Commission. We cannot stress strongly enough that we look with disfavor upon such tactics and will take whatever steps necessary to deter them.

11. If adopted, CSC's position would transform a rule of administrative efficiency into one of administrative idiocy. The Commission granted the conditional consent to assignment of CSC's construction permit -- and CSC accepted that conditional grant[11] -- knowing that the result of the then-pending arbitration proceeding might require rescission of the grant. That condition has come to pass, and we therefore find it necessary and appropriate to rescind our consent to the assignment of CSC's DBS construction permit to Nevada DBS.

Conclusion

12. Accordingly, IT IS ORDERED that Loral's request for rescission of the consent to assignment, filed November 15, 1994, IS GRANTED.

13. IT IS FURTHER ORDERED that Rainbow's petition to revoke the consent to assignment, filed October 13, 1994, and CSC's motion to strike that petition, ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Bureau Chief

[10] See Letter from Lawrence Bernstein to William F. Caton (Nov. 30, 1994) at 4.

[11] Since CSC did not file within 30 days a written rejection of the grant, it accepted the grant as conditioned. See 47 C.F.R. § 1.110.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)		
	)		
VIA USA, Ltd.	)	File Nos.	I-T-C-93-031
TELEGROUP, INC.	)		I-T-C-93-050
	)		
Applications for Authority Under	)		
Section 214 of the Communications	)		
Act of 1934, as amended, to operate	)		
as International Resale Carriers	)		
	)		
DISCOUNT CALL	)	File No.	I-T-C-93-054
INTERNATIONAL CO.	)		
	)		
Application for Authority Under	)		
Section 214 of the Communications	)		
Act, as amended	)		

ORDER ON RECONSIDERATION

Adopted: June 13, 1995 Released: June 15, 1995

By the Commission:

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I. INTRODUCTION

1. With this order, we reconfirm that call-back service utilizing uncompleted call signalling is consistent with our policy in favor of resale of international switched service. Call-back advances the public interest, convenience and necessity by promoting competition in international markets and driving down international phone rates. We believe it is in the best interests of consumers -- and eventually of economic growth -- around the world.

2. On April 12, 1994, the Commission granted the above-referenced Section 214 applications to resell international switched services using a "call-back" configuration.[1] AT&T filed a petition for reconsideration of our Call-back Order in which it argues that call-back service using uncompleted call signalling constitutes wire fraud and violates the Communications Act of 1934. After soliciting and obtaining the opinion of the Department of Justice, we find the use of uncompleted call signalling does not constitute wire fraud. We also conclude that the resale of international switched service for the provision of call-back service using uncompleted call signalling is not an unreasonable practice or contrary to the public interest under the Communications Act. Further, we agree with the Department of State that this practice does not violate International Telecommunications Union (ITU) regulations. We accordingly deny AT&T's petition. In addition, as a matter of international comity, we reaffirm our prior conclusion that U.S.-based providers may not offer international call-back using uncompleted call signalling in countries that have specifically prohibited this practice.

II. BACKGROUND

3. Call-back service is provided by U.S. international long-distance resellers as a means for their customers, located outside of the United States, to access U.S-based international lines. Typically, a signalling call is placed by the originating caller overseas to the call-back provider's switch located in the United States. If uncompleted call signalling is used, the caller dials the provider's switch in the United States, waits a predetermined number of rings, and hangs up without the switch answering. The switch then automatically returns the call, and upon completion, provides the caller with a U.S. dialtone. All traffic is thus originated at the U.S. switch. The calls are billed at U.S. tariffed rates, which are often much lower than those of the originating country.

4. In the Call-back Order, we found that the public interest, convenience and necessity would be served by granting the above-cited applications to resell the international switched services

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[1] VIA USA, Ltd et al., 9 FCC Rcd 2288 (1994) (Call-back Order).

of various U.S. common carriers. We declined to find that one call-back method -- uncompleted call signalling (or "code calling") -- constituted an unreasonable practice under Section 201(b) of the Communications Act. We noted that call-back services could place significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. ratepayers and industry by stimulating foreign-billed traffic and thus reducing the net settlements imbalance. We made no finding with respect to the legality of call-back services under international law as set forth in the International Telecommunication Regulations (ITR).[2] However, we required that licensees provide service in a manner consistent with the laws of countries in which they operate.[3]

5. AT&T's petition for reconsideration alleges that uncompleted call signalling is an unreasonable practice under Section 201(b) of the Communications Act,[4] and is not in the public interest under Section 214 of the Act because it contravenes the federal wire fraud statute and constitutes theft of service. AT&T further alleges this practice violates Section 202(a) of the Act. MCI and Sprint agree. We received comments supporting AT&T's petition from COMTELCA/INTEL[5] which raise issues of international law and comity. In particular, COMTELCA/INTEL contend that call-back services utilizing uncompleted call signalling violate Articles 1.5 and 3.3 of the ITR. Comments were also received on the legal status of call-back services in general in a number of foreign countries, in support of the contention that U.S. authorization of call-back offends international comity. We agreed that the issues raised in the comments supporting AT&T's petition merited examination, and sought, on our own motion, additional comment on all of them.[6] We also solicited the views of the Department of Justice ("Justice") on the wire fraud issue, and the Department of State ("State") on the issues of international law and comity. VIA USA, Telegroup and the Telecommunications Resellers Association each filed in opposition to the Petition for Reconsideration.

III. DISCUSSION

A. U.S. Law

6. AT&T's petition for reconsideration asks us to reexamine our finding that uncompleted call signalling does not violate the federal wire fraud statute or Sections 214, 201(b) and 202(a) of the Communications Act. We reaffirm that international call-back services using uncompleted call signalling violate neither the Communications Act nor the federal wire fraud statute.

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2 International Telecommunication Union, Final Acts of the World Administrative Telegraph and Telephone Conference (Melbourne, 1988) [hereinafter "International Telecommunication Regulations" or "ITR"]

3 Call-back Order, 9 FCC Rcd, at 2290.

4 47 U.S.C. §151 et seq. (1995).

5 COMTELCA is the Regional Technical Commission on Telecommunications of Central America, whose members are Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua. INTEL is the National Telecommunications Institute of Panama.

6 VIA USA, Ltd et al., 9 FCC Rcd 5224 (1994) (Sept. 12 Order).

(1) Sections 201(b) and 214 of the Communications Act and the Federal Wire Fraud Statute

(a) Pleadings

7. AT&T argues that uncompleted call signalling is contrary to the public interest under Section 214 and an unreasonable practice under Section 201(b) because it violates the federal wire fraud statute and constitutes theft of service. AT&T thus asks that we consider the lawfulness of the applicants' practices under criminal law, as a part of our public interest and reasonableness determinations.[7] VIA USA and Telegroup contend in their responses that wire fraud cannot occur without a completed call. In the alternative, they both argue, along with the Telecommunications Resellers of America (TRA), that uncompleted call signalling does not constitute wire fraud because there is no wrongful appropriation of money or property, based on the practice of international facilities-based carriers not to charge for uncompleted calls.[8] Sprint noted that "code-calling" does not "involve active misrepresentation of the kind that would support a finding of wire fraud."[9]

8. Independent of its contentions regarding wire fraud, AT&T also alleges that "code-calling" is theft of service and a "wrongful invasion of AT&T's property."[10] AT&T further objects to our finding that uncompleted call signalling does not impede revenue-producing use of the network and is thus not unreasonable. While AT&T does not allege the practice degrades network performance or otherwise imposes specific costs on AT&T or other network providers, it urges us to reconsider our previous decision because it maintains that allowing uncompleted call signalling under the Call-back Order amounts to a "de minimis exception for theft."[11] VIA USA, Telegroup, and TRA respond that uncompleted call signalling is not theft because the service that AT&T claims is being stolen is willingly provided free of charge.

(b) Discussion

9. Our Call-back Order rejected AT&T's charge that uncompleted call signalling constitutes federal wire fraud and thus violates Section 201(b) of the Communications Act. We thus found that AT&T failed to show the practice is contrary to the public interest and unreasonable under Section 201(b).

10. On reconsideration, we sought the opinion of the Department of Justice as to whether uncompleted call signalling violates the federal wire fraud statute. See 18 U.S.C. § 1343.[12] Justice agreed with our prior analysis and determined that uncompleted call signalling does not constitute

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7 AT&T Petition for Reconsideration, at 8.

8 VIA USA Opposition, at 9-10; Telegroup Opposition, at 8,10; TRA comments, at 6.

9 Sprint Comments, at 6.

10 AT&T Petition for Reconsideration, at 7.

11 Id., at 6.

12 Letter from William Kennard, General Counsel, F.C.C., to Walter Dellinger, Assistant Attorney General, Department of Justice (September 22, 1994).

wire fraud. We therefore affirm that uncompleted call signalling does not violate the federal wire fraud statute.

11. According to Justice, the essential elements of a violation of Section 1343 are that "the defendant created a scheme to defraud or for obtaining money or property by means of false representations and, for the purpose of executing that scheme, made or caused some sort of transmission by wire or radio in interstate or foreign commerce."[13] The Justice analysis focused on whether uncompleted call signalling constitutes a "scheme to defraud," which in turn requires an analysis of existing precedent on what constitutes "dishonest methods or schemes."[14] In each case involving fraud in obtaining phone service, Justice found four factors present: (1) the defendant obtained or conspired to obtain a service the carrier charged for; (2) the defendant avoided payment or did not pay the full rate for the service; (3) the defendant's conduct violated a statute, tariff or formal agreement; and (4) the conduct was unauthorized or was concealed.[15]

12. In the case of uncompleted call signalling, Justice found, at most, only factors (2) and (4) present. Specifically, factor (2) is present because call-back operators employing uncompleted call signalling do not pay for the service, and factor (4) may be present because uncompleted call signalling is not expressly authorized by AT&T or other international carriers.[16] However, Justice noted that factor (1) is absent because neither AT&T nor any other international carrier reflected in the record charges for uncompleted calls. In addition, factor (3) is inapplicable because, as noted in our Call-back Order, AT&T does not allege that uncompleted call signalling violates the governing tariff between AT&T and its foreign corespondents.[17]

13. Justice thus concludes that "there are insufficient indicia of fraud to make out a case under Section 1343 under the theories of those cases. . . . It appears, therefore, that the U.S. carriers have found and are legitimately exploiting a loophole in AT&T's tariff structure."[18] We agree with Justice's analysis that uncompleted call signalling is not a violation of the federal wire fraud statute and is not for that reason an unreasonable practice under Section 201(b) of the Communications Act.

14. We turn next to AT&T's contention that uncompleted call signalling is an unreasonable practice under Section 201(b) because it constitutes theft of service. AT&T defines theft

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[13] Attachment to Letter from Richard L. Shiffrin, Deputy Assistant Attorney General, Department of Justice, to William E. Kennard, General Counsel, F.C.C. (February 13, 1995) (Justice Dept. Memo), at 3-4.

[14] Justice Dept. Memo, at 8.

[15] Id., at 9.

[16] Justice notes that it could be argued that factor (4) is not present because use of uncompleted call signalling was not concealed from AT&T and the practice is not prohibited by AT&T, but that the practice is arguably prohibited as AT&T now protests use of the practice. Justice Dept. Memo, at 9, n. 13.

[17] Call-back Order, 9 FCC Rcd, at 2291.

[18] Justice Dept. Memo, at 11.

as "[t]he fraudulent taking of personal property belonging to another . . . with the intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."[19] We recognize that uncompleted call signalling constitutes an uncompensated use of the network. However, in the system as currently structured by facilities-based carriers, customers do not expect to pay for an uncompleted call. Nor do carriers expect to be compensated. Because there is no expectation of payment for uncompleted calls, the failure to pay for those calls does not deprive carriers of anything they are otherwise due. Thus, we cannot find that any "property" is "taken."

15. In our Call-back Order, we said that AT&T had not produced evidence that uncompleted call signalling imposes costs on AT&T and its ratepayers through uncompensated use of the network. AT&T understood us to say that any uncompensated use of the network is permissible as long as it is "de minimis."[20] This was not our intent. We do not condone the failure to pay network owners the amount they charge for network use, de minimis or otherwise. Uncompleted call signalling is permissible because the carriers do not charge for such calls,[21] and not because carriers have failed to demonstrate that the costs such a call imposes are substantial or that it impedes use of the network.[22]

16. Indeed, as we noted in our Call-back Order, AT&T is poorly situated to complain about someone using the network for an uncompleted call. It manufactures and markets answering machines which answer an incoming call on a shorter number of rings only when it has received messages. This allows the machine's owner to hang up before the machine answers if there are no messages to retrieve, avoiding any charges for the call, but nevertheless signalling that there are no recorded calls.[23] AT&T argues that this service is distinguishable from uncompleted call signalling because the caller only intends an uncompleted call if the answering machine has no messages to play, whereas users of uncompleted call signalling do not ever intend that the call be completed.[24] We do not find this distinction relevant to our concerns here. AT&T has designed and marketed a device which utilizes the network free of charge in certain circumstances. We see no principled distinction between uncompensated use of the network by AT&T's answering-machine customers and such use by customers of uncompleted call signalling services. The fact that AT&T and other companies manufacture equipment designed to make free use of the network is powerful evidence that these carriers do not consider such use of the network compensable under their existing tarrifs.

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[19] AT&T Petition for Reconsideration, at 6, n.3 (quoting Black's Law Dictionary (6th ed. 1990)).

[20] Id., at 5.

[21] Cf. Rules and Policies Regarding Calling Number Identification Service -- Caller ID, CC Docket No. 91-281.

[22] We note that the Telecommunications Authority of Hong Kong has adopted the same position in its March, 1995 statement on the legality of call-back services under its law. "Response to Specific Arguments of Hong Kong Telecom International Not Covered in TA's Statement on Call-back Services," The Regulatory Status of Call-back Services, Statement of Alexander Anthony Arena, the Telecommunications Authority (TA), Hong Kong, at 3-4 (March, 1995).

[23] Call-back Order, 9 FCC Rcd at 2291.

[24] AT&T Petition for Reconsideration, at 15.

17. Although we find that uncompleted call signalling is not an unreasonable practice, we note that uses of the network which degrade network performance or impair service offerings would violate the tariffs of the underlying facilities-based carriers. In this regard, we received comment from Telecom Italia and KDD alleging network degradation due to call-back services.[25] Although their comments refer to uncompleted call signalling, we understand these comments to be directed at "hot line" or "polling" methods of providing call-back service. By this method, a U.S-based reseller places a continuous stream of "bids" to the foreign customer's telephone number. When the customer chooses to initiate a call, he "answers" his telephone and is provided with a U.S. dialtone. Such a constant claim on network resources does not provide the carrier with a corresponding source of revenue, and at the same time it precludes the carrier from carrying revenue-producing traffic over those circuits.

18. As we stated in our Call-back Order, U.S. facilities-based carriers generally have tariff provisions requiring subscribers to avoid interfering with service provided by the carrier.[26] These provisions could allow the facilities-based carrier to terminate service to a reseller whose "hot line" practices interfere with its ability to provide service. AT&T and MCI have each filed ex parte comments regarding this practice and each carrier asserts that such activity violates its underlying tariff.[27] These carriers are aware of the problem and actively take measures to stop this practice. Nothing in this order should be construed as authorizing such practices or preventing such remedial measures.

19. In sum, because we agree with Justice that the use of uncompleted call signalling does not constitute federal wire fraud, and because we find that the practice does not constitute theft of service, we do not find that it is an unreasonable practice under Section 201(b) or that it is contrary to the public convenience and necessity under Section 214.

(2) Section 202(a)

(a) Pleadings

20. AT&T alleges that uncompleted call signalling violates Section 202(a) because "[p]ermitting Applicants to use AT&T's network to transmit information discriminates unreasonably

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[25] See letter from Ettore Riccitelli, North America Area Manager, Telecom Italia, to Reed E. Hundt, Chairman, F.C.C. (March 28, 1995); letter from Kazunori Inagaki, Director, Washington Liaison Office, KDD, to Reed E. Hundt, Chairman, F.C.C. (May 23, 1995).

[26] Callback Order, 9 FCC Rcd, at 2291. See, e.g., AT&T Tariff F.C.C. No. 1, Part 2.7.2.C, which states: "the operating characteristics of the Customer equipment or Customer-provided communications system connected to LDMTS must not interfere with or impair any of the services offered by this company." To the extent that specific uses of AT&T's tariffs can be shown to result in blockage of calls originated by AT&T, it would indeed interfere with AT&T's service and violate its tariff.

[27] Letter from Leonard Sawicki, MCI to Diane J. Cornell, Chief, Telecommunications Division, International Bureau, April 27, 1995; Letter from Steven Garavito, AT&T to Diane J. Cornell, Chief, Telecommunications Division, International Bureau, May 2, 1995.

against other customers who must pay for transmission of information."[28] It offers little further analysis to support this contention. Telegroup argues that the Commission's rules do not permit us to consider AT&T's Section 202 argument on reconsideration because it was not raised in the original proceeding.[29] It further contends, as does VIA USA, that Section 202 applies only to discrimination against customers, not against carriers, and thus cannot apply here because AT&T does not allege that the applicants discriminate among any of its own customers. Further, VIA USA, Telegroup, and TRA agree with our earlier finding that the cases cited by AT&T to support its Section 202 contention are factually distinguishable. VIA USA and TRA also argue that the cases cited by AT&T were wrongfully decided and are of limited precedential value. Finally, TRA argues that in any event, the cases are not binding because the Commission is not bound to follow the statutory interpretation of individual U.S. District courts.[30]

(b) Discussion

21. Whether or not AT&T properly raised the issue, we do not believe Section 202(a) applies to uncompleted call signalling. Section 202(a) provides that "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service. . . ."[31] The Court of Appeals for the District of Columbia Circuit has enunciated a three-step analysis for alleged violations of Section 202(a): "(1) whether the services are 'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether this difference is reasonable."[32] It is unclear from AT&T's pleadings what services it contends are "like" uncompleted call signalling. We surmise that AT&T contends that users who convey information via normal International Message Toll Service ("IMTS") calls are unfairly discriminated against because they must pay to transmit information while other users are able to transmit information free of charge using uncompleted call signalling.

22. In determining whether services are "like," the D.C. Circuit uses a "functional equivalency" test, which focuses on whether "the services are different in any material functional respect." In applying this test, we look to the nature of the services and then determine whether customers perceive them as the same, with cost considerations being the sole distinguishing factor.[33] Uncompleted call signalling and IMTS are obviously not "functionally equivalent" because IMTS provides real-time two way voice communication, whereas uncompleted call signalling merely conveys one-way the simple signal that a call is made from a particular number. Moreover, although there is a price difference between the two services (most if not all carriers provide uncompleted calls

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28 AT&T Petition for Reconsideration, at 11.

29 Telegroup's Opposition, at 8-9.

30 TRA Comments, at 9.

31 47 U.S.C. § 202 (a).

32 Competitive Telecommunications Association v. F.C.C., 998 F.2d 1058, (D.C. Cir. 1993). See also MCI v. F.C.C., 917 F.2d 30 (D.C. Cir. 1990).

33 MCI v. FCC, 917 F.2d at 39.

free of charge while charging for IMTS calls), the almost universal acceptance of this distinction is strong evidence that this difference in price is based on an underlying difference in value -- and is therefore reasonable. We therefore do not find that uncompleted call signalling is unreasonably discriminatory in violation of Section 202 of the Act.

23. The two unreported U.S. district court cases cited by AT&T, decided in the 1950s,[34] involved a scheme whereby two trucking companies conveyed loading and location information between drivers and their central offices in code by means of unaccepted person-to-person collect calls. In our Call-back Order, we found the conduct described in these cases was distinguishable from uncompleted call signalling because the defendants in those cases used operators to convey specific information and engaged in conduct contrary to the carrier's underlying tariff. In contrast, AT&T did not allege that uncompleted call signalling is contrary to any tariff, nor did it allege that it impedes revenue-producing use of the network. Thus the cases did not persuade us that uncompleted call signalling was contrary to the public interest.

24. AT&T argues again that the cases are analogous to uncompleted call signalling. But AT&T misses the crucial distinction: the practice in which the trucking companies engaged violated the carrier's tariffs, whereas uncompleted call signalling does not.[35] It has no effective reply to this distinction. We therefore cannot conclude from these cases that uncompleted call signalling violates Section 202.

(3) Commission Policy

(a) Pleadings

25. AT&T asserts that our finding that uncompleted call signalling is consistent with our international resale policy and not contrary to the public interest rests on the erroneous assumption that uncompleted call signalling is "necessary" to promote resale.[36] MCI and Sprint also object to our finding. AT&T states that uncompleted call signalling is not necessary because other methods of providing international call-back services exist which compensate the originating carrier for the initial call.[37] VIA USA and TRA argue that AT&T's statement misrepresents our actual conclusion: call-back is in the public interest because it places downward pressure on foreign collection rates.[38] TRA argues that, notwithstanding the existence of other call-back methods, uncompleted call signalling is in

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[34] Southwestern Bell v. National Van Lines, et al., Civ. Action No. 7021 (N.D. Tex. 9/27/57); Southwestern Bell v. King Van Lines, et al., Civ. Action No. T-1524 (D. Kan. 12/10/56); Unreported cases generally have limited or no precedential value. See e.g. D.C.Cir. Rule 14.

[35] National Van Lines, Civ. Action No. 7021, slip op., at 3; King Van Lines, Civ. Action No. T-1524, slip op., at 3.

[36] AT&T Petition for Reconsideration, at 11.

[37] Id., at 11.

[38] TRA Comments, at 17; VIA USA Opposition, at 11.

the public interest because it enables service providers to offer the lowest possible collection rates and exerts the greatest pressure on foreign carriers to lower international collection rates.[39]

(b) Discussion

26. AT&T misunderstands our finding. We did not conclude that call-back service utilizing uncompleted call signalling is "necessary" to promote resale.[40] And, obviously, we are well aware that there are alternate methodologies for offering call-back services. But this does not mean that uncompleted call signalling is contrary to the public interest.

27. The market for international call-back services has been created, at least in part, by the large disparity between U.S. and foreign collection rates. This disparity encourages suppliers to offer lower cost options like call-back service to users who can then avoid higher cost, foreign-billed service. As users shift to call-back service, a telecommunications operator will be under pressure to reduce its collection rates to consumers of similar services. These reductions, in addition to attracting some users away from call-back service, will stimulate additional, foreign-billed demand which may have the beneficial effect of reducing the U.S. traffic imbalance, U.S. net settlements payments, and U.S. carriers' average net settlement cost per minute.

28. We continue to believe that call-back service using uncompleted call signalling promotes the public interest by providing increased competition in foreign markets which places significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. consumers and industry whether located within the United States or abroad.[41] Several telecommunications operators have lowered collection rates significantly in response to call-back services.[42] This is important evidence that the provision of call-back service furthers our underlying policy in favor of international resale and promotes the public interest.

29. AT&T has thus failed to show that uncompleted call signalling is contrary to the public convenience and necessity under Section 214 of the Communications Act. We conclude that uncompleted call signalling neither constitutes theft of service nor violates the federal wire fraud statute. It is not an unreasonable practice under Section 201(b) of the Communications Act and does not cause a carrier to discriminate unreasonably in violation of Section 202(a) of the Communications Act. In sum, uncompleted call signalling is permissible under U.S. law and advances important policy goals.

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[39] TRA Comments, at 17.

[40] AT&T Petition for Reconsideration, at 11.

[41] See, e.g., International Relay, Inc., 77 FCC Rcd 2d 819, 824 (1980).

[42] See, e.g., "Singapore Cuts Phone Rates," Wall St. J., Nov. 1, 1994, at A2; "Special Report: PTT revenue hit by 'callback' racket," Saudi Gazette, March 13, 1995; "Argentina Approves Telephone Rate Reductions," Reuters, October 1, 1993; "Phone War Pushes Brazil to Drop Long-Distance Rate," The Reuter European Business Report, August 1, 1993; "Alarm bells ring over Telebras tariffs - Brazil has returned to interventionism," Financial Times, November 1, 1994.

B. International Law and Comity

(1) International Telecommunication Regulations

(a) Pleadings

30. Our Call-back Order did not address the argument that call-back services violate international law. That argument has now been put forward. As we take adherence to international obligations seriously, we have sought the advice of the Department of State,[43] and address these issues here.

31. COMTELCA/INTEL assert that call-back utilizing uncompleted call signalling violates international law. They contend that call-back providers are Private Operating Agencies ("POAs") and Recognized Private Operating Agencies ("RPOAs"), as defined in the 1982 Nairobi Convention,[44] and therefore fall within the scope of the International Telecommunication Regulations. Noting that Article 1.5 of the ITR specifies that "the provision and operation of international telecommunications services in each *relation* is pursuant to *mutual agreement* between administrations,"[45] they assert that uncompleted call signalling is a "relation" different from that contemplated in existing operating agreements between facilities-based carriers. They further contend that, since call-back providers have not obtained operating agreements with administrations in the countries in which they operate, there is no "mutual agreement". In addition, they claim that call-back providers are in violation of Article 3.3 of the ITR, which provides that "[a]dministrations shall determine by mutual agreement which international routes are to be used."[46] COMTELCA/INTEL allege that call-back services generate indirect routings of calls and affect accounting rates in ways Article 3.3 is designed to prevent, and in any event have not been agreed to by the affected Administrations.

32. VIA USA, Telegroup, and TRA contest the assertion that the ITR are applicable to call-back providers, on the grounds that resellers are neither POAs nor RPOAs under the 1982 Nairobi Convention. Even if they were, these commenters contend that uncompleted call signalling is not a "service" within the scope of Article 1.5, but rather is a means of accessing a service --

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[43] Letter from Scott Blake Harris, Chief, International Bureau, F.C.C., to Vonya McCann, United States Coordinator, International Communications and Information Policy, Department of State (October 28, 1994).

[44] International Telecommunication Convention, Final Protocol (Nairobi, 1982)("1982 Nairobi Convention"), Annex 2-2008, 2009 at 149. The 1992 ITU Geneva Convention removed the word "private" from the phrases "private operating agency and recognized private operating agency," but the definitions of the amended phrases remain virtually unchanged and thus would not alter our analysis. See Constitution and Convention of the ITU, Final Acts (Geneva, 1992), Annex 1007-08 at 66. While the United States has signed the Geneva Final Acts, we have not yet ratified the Geneva ITU Constitution and Convention, with the result that the 1982 Nairobi Convention and not its successor binds the United States as a matter of both international and domestic law.

[45] ITR, Article 1.5 at 4 (emphasis added).

[46] ITR, Article 3.3 at 7.

IMTS -- already covered by underlying carriers' operating agreements. They further contend that Commission precedent and policy do not require resellers to obtain operating agreements. Similarly, these commenters argue that Article 3.3 should not be interpreted to require resellers which transit traffic through the United States to enter into operating agreements concerning their routing arrangements.

(b) Discussion

33. We limit our ruling on the international law issues to the uncompleted call signalling configuration of call-back offerings because AT&T's petition and the comments submitted in response to our Sept. 12 Order focused on this methodology.[47] In addition, the Department of State analyzed the international law issues posed by uncompleted call signalling only.[48]

34. There is no disagreement over the relevance of international law. The United States, as a party to the 1982 Nairobi Convention and to the ITR, is subject to the obligations imposed by these instruments.[49] As the Commission has ruled, "[the] United States Government is bound...to assure that all U.S. nationals or other entities operating within its borders obey the binding international regulations" of the ITU.[50]

35. The ITR do not purport to cover all aspects of telecommunications, especially technological developments such as call-back that post-date their adoption. As State notes, the United States and other countries took the view (both during the international conference at which the ITR were agreed and in subsequent national ratification proceedings) that the ITR did not foreclose telecommunications innovations or impede differing national legal and regulatory regimes.[51] The signatories to the ITR thus did not intend that they be definitive in scope. As State observes:

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[47] In the Reconsideration Order, 9 FCC Rcd 5224, n. 5 (1994), we noted that COMTELCA/INTEL's comments also had referenced other call-back methods, but the record subsequently developed does not address international law issues they might pose.

[48] Letter from Ambassador Vonya McCann, United States Coordinator, International Communications and Information Policy, Department of State, to Reed E. Hundt, Chairman, F.C.C. (March 22, 1995) (State letter), at 1.

[49] Article 2, 1982 Nairobi Convention, see supra, note 44. Article 42(1) of this Convention expressly identifies ITU Administrative Regulations as constituting part of the binding international obligations imposed by Article 2. Articles 3(1) and 4(1) of the 1992 Geneva Convention are comparable in effect.

[50] International Communications Policies Governing Designation of Recognized Private Operating Agencies, 104 FCC 2d 208, 216 (1986).

[51] State letter, at 2. See July 1, 1991 Letter of Transmittal from the Secretary of State to the President for the International Telecommunication Regulations at VI, 102th Cong., 1st Sess. U.S. Senate Treaty Doc. 102-13 (1991). See generally, Document AP IX-27-E, CCITT, IXth Plenary Assembly, Melbourne, 1988 (in particular, paras 1 - 3.7, Statement of the United States and Statement of the United Kingdom).

the call-back configuration was not anticipated during the negotiation and conclusion of the International Telecommunications Regulations...and has not been anticipated by the Recommendations developed by the International Telegraph and Telephone Consultative Committee (CCITT) or, to date, by its successor, the Telecommunication Standardization Sector (ITU-T). Thus, it is our view that the 'call-back configuration' is not prohibited by the Melbourne Agreement or any of the current ITU-T Recommendations.[52]

36. That call-back was neither envisaged nor prohibited by the ITR or subsequent ITU-T Recommendations does not necessarily place it outside the scope of specific ITR provisions. We are not persuaded, however, by COMTELCA/INTEL that the uncompleted call signalling call-back configuration contravenes Articles 1.5 and 3.3 of the ITR.

37. International telecommunication "service" is defined in Article 2.2 of the ITR as "the offering of a telecommunication capability between telecommunication offices or stations of any nature that are or belong to different countries." The generality of this definition was intended to complement the purpose, set forth in Article 4.2, that "Members...provide, by mutual agreement, a wide range of international telecommunication services which should conform, to the greatest extent practicable, to the relevant CCITT Recommendations." Thus, in defining "service" under Article 2.2, ITU-T (formerly CCITT) Recommendations should be the guide. As noted above, call-back is not the subject of any such Recommendation. State therefore concludes: "...[u]nder the Melbourne Agreement and existing ITU-T Recommendations, call-back as a technical configuration is not a discrete 'international service,' as that term is used in the Melbourne Agreement (Art. 1.1, Art. 2.2); rather the call-back configuration is a signalling mechanism that facilitates the provision of telephony service by underlying carriers."[53] We concur in this analysis.

38. Article 1.5 of the ITR provides: "Within the framework of the present Regulations, the provision and operation of international telecommunication services in each relation is pursuant to mutual agreement between administrations."[54] Uncompleted call signalling is simply a means of accessing IMTS, a service which is already explicitly included in operating agreements between facilities-based providers, and thus subject to "mutual agreement." Call-back providers offer a means of delivery different from that ordinarily utilized by a customer in a foreign country, but the service delivered (IMTS) is identical.[55] Since call-back is not a service under Article 2.2, the "mutual

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[52] State letter, at 2.

[53] Id. at 4.

[54] COMTELCA/INTEL frame the question as whether call-back is a "relation" different from those already contained in operating agreements entered into pursuant to Article 1.5. See COMTELCA/INTEL Reply Comments at 9. This assumes, however that call-back is a "service" within the scope of Article 1.5. We focus on that legal issue, and conclude that the assumption is wrong.

[55] The Hong Kong Telecommunications Authority, in concluding that call-back services do not infringe Hong Kong Telecom International's monopoly over provision of international facilities, relied on the same rationale: call-back is simply a means of access and not a competing provision of facilities. See Hong Kong Telecommunications Authority Statement, supra, note 22, at 5. KDD, by contrast, contends that call-back is distinguishable from IMTS because it is perceived by consumers as an alternative

agreement" requirement only applies to the underlying IMTS service, not to the call-back configuration used to access that service.[56] As the "mutual agreement" obligation does not apply to the uncompleted call signalling method, we need not reach the separate contention that it does not apply to call-back providers because they are neither POAs nor RPOAs under the terms of the 1982 Nairobi Convention.

39. We further agree with State's conclusion that the uncompleted call signalling call-back configuration is consistent with Article 3.3 of the ITR governing the transiting of international traffic. That article provides:

> Administrations shall determine by mutual agreement which international routes are to be used. Pending agreement and provided there is no direct route existing between the terminal administrations concerned, the origin administration has the choice to determine the routing of its outgoing telecommunication traffic, taking into account the interests of the relevant transit and destination administrations.

State notes that this provision is intended, in large part, to govern the relationship between Administrations/RPOAs and their foreign counterparts with respect to call routing. The uncompleted call signalling configuration, by contrast, relies on the user's choice to generate the routing.[57] State therefore concludes that "Article 3.3 does not regulate the actions of individual consumers in placing telephone calls or selecting modes of telephony."[58] In addition, the two underlying IMTS calls originating in the call-back provider's country are routed pursuant to operating agreements in place between the international facilities-based service providers at each end of those calls, and compensated according to the rates set forth in those agreements. State further notes that the third element, the

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international service, see KDD letter, supra note 25.

[56] Reliance by commenters VIA USA and TRA on the Commission's International Relay, Inc. (IRI) order, 77 FCC 2d 819 (1980), on recon. 82 FCC 2d 41 (1980), for the proposition that an operating agreement is not required as a matter of international law is, however, misplaced. Because IRI needed to ensure interconnection in a foreign country, it did not contest that an operating agreement was an appropriate condition of its Section 214 authorization, but rather insisted only that it need not be a condition precedent, and the Commission so found. Nothing in that order addressed whether international law, in the form of the ITR or other binding international obligations, compelled the Commission to insist that resellers enter into operating agreements as a condition of a Section 214 authorization. We nevertheless observe that our finding in IRI supports our policy goals here in that call-back, like international resale generally, promotes competition and would be frustrated by imposition of an operating agreement requirement.

[57] For this reason, this proceeding is distinct from the pending petition filed by MCI, File No. ISP 95-004, concerning reorigination practices allegedly engaged in by Sprint Communications, L.L.P., under negotiated arrangements with originating carriers.

[58] State letter, at 4. The Hong Kong Telecommunications Authority, in examining the conformity of international call-back to Article 3.3 of the ITR, similarly found this provision inapplicable to how customers of facilities-based carriers choose the optimum circuit to suit their needs and/or minimize costs. See Response to Specific Arguments of Hong Kong Telecom International Not Covered in TA's Statement on Call-back Services, March 1995, supra note 22, at 3.

uncompleted call portion of uncompleted call signalling, is not prohibited by current ITU Conventions or Recommendations.[59]

40. Finally, we note that the ITU itself has not determined the legal status of international call-back under the ITR. At the 1994 ITU Plenipotentiary Conference in Kyoto, a resolution on alternative calling services was discussed and ultimately adopted.[60] Contrary to the assertions of some commenters, however, the resolution neither imposes binding international obligations upon ITU Member States, nor constitutes findings by the organization on the status of call-back under international law.

41. In sum, we conclude that international law does not preclude the uncompleted call signalling configuration of international call-back.

(2) International Comity

(a) Pleadings

42. We received information on the status of international call-back under the laws of twenty-one countries. The comments fall into five broad categories. Two countries' communications regulatory authorities have endorsed call-back service.[61] Two governments object to call-back on policy, and not legal, grounds. Two others state that call-back is contrary to national law but provide no further detail.[62] Three identify specific administrative regulations or rulings barring international call-back.[63] The largest category, twelve countries, point to general telecommunications legislation or concession arrangements which have the effect of requiring administrative approval or licensing of all activities not vested in the national provider.[64] None of the countries in this last category suggest that such approval or licensing of call-back providers would take place. Indeed, the overall position expressed in these statements is to the contrary.

43. All of the foreign governments or carriers whose comments support the AT&T petition ask that the Commission withdraw authorization for call-back services because of their national objections. In addition, COMTELCA/INTEL, as well as several foreign governments and carriers, assert that the resolution adopted at the 1994 ITU Plenipotentiary Conference in Kyoto[65] highlights the strength of governmental objection to international call-back services.

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[59] State letter, at 4.

[60] Final Acts of the Plenipotentiary Conference (PP-94), Res. COM4/6 (Kyoto, 1994).

[61] Argentina and Hong Kong.

[62] Mexico and Thailand.

[63] Costa Rica, the Phillipines and Venezuela.

[64] Belize, Bolivia, Colombia, Costa Rica, Czech Republic, Ecuador, Mexico, Panama, Peru, Phillipines, Thailand, and Venezuela.

[65] See supra note 60.

COMTELCA/INTEL further point out that Commission precedent has expressly recognized the importance of international comity considerations. While acknowledging that our Call-back Order did require call-back providers to act in a manner consistent with the laws of countries in which they operate, COMTELCA/INTEL contend that this requirement thus far has proven ineffective,[66] and that the Commission should further insist that call-back providers seeking authorization under Section 214 certify their compliance with relevant foreign law as a precondition to licensing.

44. VIA USA asserts that the scale of foreign objection to international call-back is overstated, noting that a number of countries have either expressly allowed uncompleted call signalling to occur or taken steps (such as reducing international rates) indicating their accommodation to the phenomenon. VIA USA, Telegroup, and TRA do not contest the appropriateness of FCC recognition of international comity, but rather contend that the general requirement contained in the Call-back Order regarding conformity with applicable foreign law fully satisfies this standard. Indeed, they argue that going further would put the United States in the position of enforcing foreign telecommunications service approval procedures, contrary to U.S. declarations in the final protocol to the ITR.[67]

(b) Discussion

45. Our Call-back Order expressly required applicants to provide international call-back offerings "in a manner that is consistent with the laws of countries in which they operate."[68] The submissions of COMTELCA/INTEL and a number of other governments suggest that this general requirement may not have deterred some call-back providers from offering their services in countries which regard them as illegal. We therefore have reviewed international call-back using uncompleted call signalling in light of the doctrine of international comity. We reaffirm our previous finding that call-back providers utilizing the uncompleted call signalling configuration must provide this offering in a manner consistent with the laws of countries in which they operate.

46. Preliminarily, we note that our findings with respect to international comity, as with regard to international law, apply to the uncompleted call signalling configuration of international call-back only. The comments center on this means of offering call-back, and State's analysis limits itself to this methodology.

47. The doctrine of comity reflects the broad concept of respect among sovereign nations, and is useful in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[69] It is a discretionary means for U.S. courts

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[66] COMTELCA/INTEL Reply Comments, at 21. Foreign countries assert that they are unable to identify some international call-back providers to the extent they utilize local representatives, advertisements, or direct mail solicitations to obtain customers, thereby avoiding establishment or other forms of local presence which would make them amenable to domestic legal requirements.

[67] ITR, Final Protocol (for the United States of America), No. 39(I)(a),(b) at 59.

[68] Call-back Order, 9 FCC Rcd at 229 .

[69] Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143 (1895). See Restatement (Third) of the Foreign Relations Law of the United States, § 101, comment e (1986).

and agencies to take account of foreign sovereign acts, and therefore is distinct from obligations imposed under international law.[70] Indeed, the United States declared, in the Final Protocol adopting the International Telecommunication Regulations in 1988, that we understood the ITR as a whole, and Article 1.7 in particular, to mean that we did not "accept any obligation to enforce any provision of the domestic law or regulations of any other Member."[71] The United States also declared that it did not "endorse, in any way, domestic procedures of other Members which would require approval for providers of telecommunication services...seeking to do business outside the United States of America."[72] These declarations make clear that foreign governments could not, simply by enacting domestic legal, regulatory, or procedural measures, require the United States to implement such measures as a matter of international law.[73] They do not, of course, preclude us from choosing to honor a provision of foreign law or regulation where we believe it warranted by exceptional circumstances.

48. International call-back has been actively debated in international fora in recent years, most notably at the 1994 ITU Plenipotentiary Conference in Kyoto, which passed a resolution on alternative calling services. Comity is a central element of that resolution, which recommends that a member state having jurisdiction over a call-back provider whose operations infringe another member state's laws "inquire into the matter and take such actions as may be appropriate within the constraints of its national law."[74]

49. Foreign governmental views on international call-back are not uniform. Even among the countries of Central and South America, where opposition to international call-back services is particularly strong, certain countries (e.g. Argentina)[75] have found international call-back to be legal. In Asia, Hong Kong has found call-back consistent with its domestic telecommunications regime,[76] while Japan and Singapore have declined to take action to prevent it.[77] The European Commission

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70 See 1 Oppenheim, International Law, at 34 n.1; see also J. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1,2 (1991).

71 See supra, note 67.

72 Id.

73 See President's Message to Congress Transmitting International Telecommunications Regulations (Melbourne, 1988), Treaty Doc. 102-13, 102d Congress, 1st Session (1991), at X.

74 See supra, note 60. The resolution also urges Member States to cooperate in the application of the resolution, and commissions the ITU's Telecommunication Standardization Sector (ITU-T) to accelerate its studies and prepare a report concerning alternative calling practices. See also PCC.I Resolution II-95, establishing an ad hoc working group to study call-back. PCC.I is the Permanent Consultative Committee of CITEL, the telecommunications arm of the Organization of American States.

75 Telintar B.A. incidentes y otros c/ Comision Nat. de Telecomunicaciones, 2d Appellate Court, December 27, 1994.

76 Hong Kong Telecommunications Authority Statement, supra, note 22.

77 VIA USA Comments, at 13.

has noted, without objection, the availability of call-back services within the territories of its member states.[78] A study of call-back and other alternative calling procedures by the Organization for Economic Cooperation and Development (OECD) noted that they are driven by price distortions in monopoly-based markets. The OECD study concluded that, by introducing competition for international telephone service, these services "play a useful role in the market-place and need to be encouraged."[79]

50. Nevertheless, the record demonstrates that some foreign governments regard international call-back services as contrary to their national laws, and that they view activities taking place within the United States by providers who utilize uncompleted call signalling as contributing to the evasion of their laws. The Commission's previous discussion of international comity[80] has not addressed the situation before us today, in which some foreign countries' laws and regulations conflict with U.S. policy. We believe that foreign governments which have decided to outlaw uncompleted call signalling bear the principal responsibility for enforcing their domestic laws, just as our mandate is to implement the statutory requirements of the Communications Act. However, we recognize that foreign governments face unusual difficulties in giving effect to their laws and regulations barring uncompleted call signalling. Our invocation of comity in this circumstance would assist in the effective enforcement of such foreign laws and regulations.[81] We therefore find, as a matter of international comity, that the Commission should prohibit carriers authorized to provide call-back service utilizing uncompleted call signalling from providing this offering in countries where it is expressly prohibited. We would expect no less from foreign governments in a comparable context.

51. Accordingly, we reiterate the requirement articulated in our Call-back Order that applicants may not provide call-back using uncompleted call signalling to countries which have clearly and explicitly prohibited this offering by statute or regulatory decision.[82] Any demonstrated

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78 Commission of the European Communities, Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks, Part II, January 25, 1995, at 96.

79 OECD Working Party on Telecommunication and Information Services Policy (TISP), "Refile and Alternative Calling Procedures," DSTI/ICCP/TISP/AH(94)1, May 1994, at 17.

80 The Commission identified comity as a relevant consideration in issuing a Section 214 authorization for the construction and operation of inter-continental submarine cable facilities. AT&T, 4 FCC Rcd 1129, 1131 (1988); Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Communications Needs During the 1991-2000 Period, (*Third Notice of Proposed Rulemaking*), 3 FCC Rcd 775, 787 (1988).

81 Foreign enforcement activities are also taken into account by the Department of Justice when it decides whether to apply the doctrine of comity. Specifically, Justice looks at "the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and...the effectiveness of foreign enforcement as compared to U.S. enforcement action." U.S. Department of Justice, Antitrust Division, Antitrust Enforcement Guidelines for International Operations (April, 1995) at 21.

82 The State letter also states that the Commission should require prospective call-back providers to ensure that the relevant facilities-based carriers' operating agreements do not prohibit use of the uncompleted call signalling call-back configuration. We note that there do not appear to be any such

failure to observe this requirement will be subject to FCC enforcement action. Finally, we will use our enforcement authority to identify and sanction those resellers, including call-back providers, which are operating without proper Section 214 authorizations and tariffs.

52. We will ask the Department of State to communicate our findings and conclusions in this proceeding to foreign governments. Any foreign government which has expressly found international call-back using uncompleted call signalling to be unlawful, and which has been unable to enforce its domestic law or regulation against U.S. providers of this offering, may so notify the United States Government. Its notification should include specific documentation of its legal restrictions on international call-back utilizing uncompleted call signalling, evidence of violations by particular carriers, and a description of its enforcement measures. Any foreign government also may convey to the Commission's staff documentation of its specific statutory or regulatory measure in order to put U.S. carriers on notice that international call-back utilizing uncompleted call signalling is illegal in its territory. To facillitate such notification, we will maintain and periodically publish a list of countries which have forwarded such information to the Commission. The Commission's staff will maintain a file of all such communications, for appropriate agency action and for reference.

IV. CONCLUSION

53. In this order, we affirm our order and authorization granting the applications of VIA USA, Ltd., Telegroup, Inc. and Discount Call International Co. to resell international switched services of other carriers using a call-back configuration. Such services are in the public interest because they promote increased competition and create incentives for the reduction of foreign collection rates, to the benefit of U.S. consumers and industry. We affirm our determination that call-back provision utilizing an uncompleted call signalling configuration does not violate the federal wire fraud statute, and is consistent with the Communications Act. We further conclude that call-back services using the uncompleted call signalling configuration are consistent with the International Telecommunication Regulations. Finally, we believe that it is appropriate for the Commission, as a matter of international comity, to take note of foreign governments' legal determinations that international call-back services violate their domestic laws. We affirm that international call-back providers utilizing uncompleted call signalling may provide this offering only when it is not expressly prohibited by the laws of the countries in which they operate, and, accordingly, so condition these authorizations.

V. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED that the petition for reconsideration filed by AT&T IS DENIED.

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prohibitions in carriers' current operating agreements. In view of our finding above that call-back utilizing the uncompleted call signalling configuration is not prohibited by international or U.S. law, we see no basis for imposing such an additional requirement on call-back providers. We note, moreover, that any attempt by facilities-based carriers and their foreign correspondents contractually to bar competition by international resellers through such a prohibition in an operating agreement may pose potentially complex competitive concerns.

55. IT IS FURTHER ORDERED that applicants are prohibited from providing call-back using uncompleted call signalling to a country which has expressly prohibited this offering in its territory by statute or regulatory decision.

56. This order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-225

In the Matter of	)	
	)	
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 94-129

REPORT AND ORDER

Adopted: June 13, 1995; Released: June 14, 1995

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we prescribe the general form and content of the letter of agency (LOA) used to authorize a change in a consumer's primary long distance telephone company. An LOA is a document, signed by the customer, which states that a particular carrier has been selected as that customer's "primary interexchange carrier" ("PIC"). We take this action in response to the thousands of complaints we have received regarding unauthorized changes of consumers' PICs, a practice commonly known as "slamming."[1] We also take this action in response to the tens of thousands of additional complaints received annually by local exchange carriers (LECs) and state regulatory bodies.[2] These rules

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[1] "Slamming" means the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, an interexchange resale carrier, or a subcontracted telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994).

[2] Pacific Bell and Nevada Bell state that on average, they "receive approximately 350,000 PIC changes from the interexchange carriers...each month. Two to three percent of those changes generate complaints...." Comments of Pacific Bell and Nevada Bell at 1-2. This represents 7,000 to 10,500 complaints per month received by Pacific Bell and Nevada Bell alone. See also Comments of GTE Service Corporation (GTE), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone Company (Southwestern Bell), People of the State of California, et al. (California PUC), Missouri Public Service Commission, et al. (Missouri PSC), New York State Department of Public service (New York Public Service), Public Utility Commission of Texas (PUCT), Florida Public Service Commission (Florida PUC), and National Association of Attorneys General (NAAG).

and policies prohibit certain deceptive or confusing marketing practices of some interexchange carriers (IXCs) and are intended to significantly reduce consumer confusion over the use and function of the LOA. In crafting these rules, we have balanced the industry's need for flexibility in marketing services to consumers and the need to protect consumers from deceptive marketing practices.

2. Specifically, we adopt rules that prohibit the potentially deceptive or confusing practice of combining the LOA with promotional materials in the same document. These rules require that the LOA be a separate or severable document whose sole purpose is to authorize a change in a consumer's primary long distance carrier. Among other things, we prescribe the minimum contents of the LOA and require that the LOA be written in clear and unambiguous language. Furthermore, we prohibit all "negative option" LOAs[3] and require that LOAs contain complete translations if they employ more than one language. Finally, we except from the "separate or severable" rule a check that serves as an LOA, so long as the check contains certain information clearly indicating that endorsement of the check authorizes a PIC change and otherwise complies with our LOA requirements.

II. BACKGROUND

3. The Commission began receiving slamming complaints after the entry of multiple competitors into the long distance telephone marketplace following the divestiture of American Telephone & Telegraph Company (AT&T).[4] At that time, IXCs began to compete for presubscription[5] agreements with potential customers as a result of the equal access[6] rules and the procedures the Commission and the

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[3] "Negative option" LOAs require consumers to take some action to avoid having their long distance telephone service changed.

[4] For a more detailed history of the actions the Commission has taken thus far regarding "slamming" and its related issues, see Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Notice of Proposed Rule Making, 9 FCC Rcd 6885, 6886 (1994)(NPRM).

[5] Presubscription is the process that enables each customer to select one primary IXC, from among several available carriers, for the customer's phone line(s). Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, 928 (1985)(Allocation Order). A customer accesses the primary IXC's services by dialing "1" only. Id. at 911.

[6] Equal access for IXCs is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. United States v. American Tel. & Tel., 552 F. Supp. 131, 227 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983)(Modification of Final Judgment or

courts imposed on the interexchange telephone industry.[7]

4. The Commission's original allocation plan required IXCs to have on file an LOA signed by the consumer before submitting to the LEC an order to change a consumer's PIC.[8] The LOA provided evidence that the customer had selected that IXC as its long distance telephone company.[9] IXCs asserted, however, that this requirement would stifle competition because, as a practical matter, consumers frequently would not execute the LOAs even though they had agreed to change their PIC. In response to those objections, the Commission relaxed the requirement and allowed IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs."[10] In addition, the Commission denied a petition filed by the Illinois Citizens Utility Board that sought the adoption of additional rules governing PIC changes.[11] In balancing the industry's need for flexibility in marketing its services to consumers and the need to protect consumers from deceptive marketing tactics, the Commission concluded that the rules in place at that time adequately protected consumers against "slamming."[12]

5. Despite the consumer protection mechanisms provided by the Commission's rules and policies, some carriers continued to engage in the practice of "slamming." In response to a petition

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"MFJ"). "Equal access allows end users to access facilities of a designated [IXC] by dialing '1' only." Allocation Order, 101 FCC 2d at 911 (end user also has the capability to use other IXCs by dialing access codes).

7 Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985) (Waiver Order).

8 A PIC change may be initiated when a consumer requests the change directly from the new IXC or when the IXC solicits the consumer through telemarketing or direct mail.

9 Allocation Order, 101 FCC 2d at 929.

10 Waiver Order, 101 FCC 2d at 942.

11 Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987)(Illinois CUB Order).

12 The Commission emphasized in the Illinois CUB Order that consumers are not liable for the charges assessed by LECs for PIC changes that were not authorized by the consumers. Further, the Commission reiterated that LECs are not permitted to collect any charges from a consumer for changing the consumer's PIC if the consumer denies requesting the change and neither the LEC nor the IXC can produce sufficient evidence that the consumer requested the change. In most cases, that evidence would be the LOA. Illinois CUB Order, 2 FCC Rcd at 1728, 1729.

filed by AT&T and MCI Telecommunications Corporation (MCI) in accordance with a court settlement between them,[13] we adopted rules and procedures for verification of long distance service telemarketing sales. Specifically, we required IXCs to institute one of four confirmation procedures before submitting to LECs PIC change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order.

6. Even after the adoption of these additional consumer safeguards, we continued to receive complaints from consumers who allege that their PIC selections have been changed without their permission. Many of these complaints describe apparently deceptive marketing practices in which consumers are induced to sign a form document that does not clearly advise the consumers that they are authorizing a change in their PIC. Consumers have complained that the "LOA" forms were "disguised" as contest entry forms, prize claim forms or solicitations for charitable contributions.

7. Consequently, the Commission, on its own motion, initiated this rule making proceeding.[14] The Commission proposed rules to separate the LOA from all promotional inducements and make the LOA, which has been previously defined by the Commission, a separate document on a separate page, the sole purpose of which is to authorize a PIC change. The Commission also sought public comment on a number of related issues, including: (1) whether LOAs should contain only the name of the rate-setting carrier; (2) whether consumers should be liable for the long distance telephone charges billed by unauthorized carriers; (3) whether the Commission should adopt rules requiring that bilingual LOAs contain complete translations in both languages; and (4) whether the Commission should extend its PIC change verification procedures to consumer-initiated 800 calls.

III. DISCUSSION

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[13] See generally American Telephone and Telegraph Company, Petition for Rule Making, CC Docket No. 91-64, Notice of Proposed Rule Making, 6 FCC Rcd 1689 (1991) (PIC Change NPRM); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (PIC Verification Order), recon. denied, 8 FCC Rcd 3215 (1993) (PIC Verification Reconsideration Order).

[14] NPRM, 9 FCC Rcd 6885 (1994).

8. After the AT&T divestiture, the Commission sought to encourage a competitive long distance telephone market. To that end, the Commission gave significant weight to the argument that the only way for non-dominant carriers to compete effectively with the dominant carrier was for all carriers to be allowed to market their services with significant flexibility. As competition in the long distance telephone market has emerged, our experience in balancing consumer protection concerns and IXC marketing flexibility has evolved. Our initial decision not to require written LOAs prior to a PIC change indicated to the industry our willingness to allow IXCs to police their own marketing activities. Although we still believe self-policing to be an integral consumer protection mechanism, we cannot ignore the very large number of slamming complaints that consumers continue to submit to their local phone companies, to their state regulatory bodies, and to this Commission.

9. For any competitive market to work efficiently, consumers must have information about their possible market choices and the opportunity to make their own choices about the products and services they buy. Slamming takes away those choices from consumers. Slamming also distorts the long distance competitive market because it rewards those companies who engage in deceptive and misleading marketing practices by unfairly increasing their customer base at the expense of those companies that market in a fair and informative manner. In light of the foregoing, we find it necessary to prescribe rules that we believe will serve as an informative and useful consumer protection mechanism and an important rule of fair competition for the long distance telephone industry, while recognizing the industry's need for flexibility in marketing services to consumers.[15]

A. <u>The Minimum Requirements for LOAs</u>

10. We received nearly unanimous support for our proposed rule prescribing the general form and minimum content for an LOA. As proposed in section 64.1150(e), we will require that the LOA contain: (1) the subscriber's[16] billing name and address and each telephone number to be covered by the PIC change order; (2) a line stating the subscriber's decision to change the PIC from the current interexchange carrier to the prospective interexchange

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[15] All comments and replies on all matters in this proceeding were considered. In our discussion of the proposed rules, however, we highlight those comments representative of particular arguments or positions relevant to our decisions.

[16] In this context, the term "subscriber" is used because the only individual qualified to authorize a PIC change is the telephone line subscriber.

carrier; (3) a statement that the subscriber designates the interexchange carrier to act as the subscriber's agent for the PIC change; and (4) a statement that the subscriber understands that any PIC selection chosen may involve a charge to the subscriber for changing the subscriber's PIC.[17] As stated in the NPRM, these provisions organize and restate the LOA requirements of the Allocation Order and the PIC Verification Order into one standard rule.[18] This simplified restatement of current Commission requirements regarding LOAs was met with general acceptance by the commenters and thus will be adopted as proposed. We refrain from prescribing specific LOA language at this time. We agree with some of the commenters that differing state requirements and differences in the target market for individual promotional campaigns indicate that IXCs may be better able to tailor the specific language in a way that clearly informs the consumer of the impending choice. We believe that IXCs can police themselves in this matter given clear guidance, and we believe that these rules give that guidance. Also, we agree with Sprint Communications Co. (Sprint) that this new rule and the existing telemarketing rules (Section 64.1100) should be consistent. We therefore amend Section 64.1100(a) to read as follows: "The IXC has obtained the customer's written authorization in a form that meets the requirements of Section 64.1150, below."

11. Nearly every entity choosing to comment on the matter supported our proposed prohibition of "negative option" LOAs.[19] As noted above, this type of LOA requires a consumer to take some action to avoid a PIC change. Because we find that such LOAs impose an unreasonable burden on consumers who do not wish to change their PICs, we adopt the proposed prohibition. Further, we

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17 See Appendix B, Section 64.1150(e)(1)-(3), (5), infra. We will discuss proposed section 64.1150(e)(4) in paragraphs 25-27, infra. That proposed section provides that an LOA contain language that confirms "that the subscriber understands that only one interexchange carrier may be designated as the subscriber's primary interexchange carrier for any one telephone number and that selection of multiple carriers will invalidate all such selections." In light of comments and replies from entities including Allnet Communication Services, Inc. (Allnet), Ameritech Operating Companies (Ameritech), General Communication, Inc. (GCI), and GTE, we will modify section 64.1150(e) to allow for the possibility of multi-PIC jurisdictions.

18 NPRM, 9 FCC Rcd 6885, 6887.

19 The Public Utility Commission of Texas (PUCT) contends that if the language in section 64.1150(e) "is intended to proscribe the negative check-off that appears on some sweepstakes entries, the PUCT believes this language is unnecessary if the combination of a sweepstakes entry and LOA on the same form is prohibited." Even though we are adopting a "separate or severable" LOA rule, an IXC still might attempt to fashion a "negative option" LOA on a separate page. Therefore, we will adopt the prohibition as proposed.

agree with the comments of Allnet that the proposed section might be construed as somewhat vague. We therefore adopt some of Allnet's suggested language and modify the provision to read: "Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current interexchange carrier."[20]

12. Although many commenters oppose any Commission-prescribed LOA text, font, or type size, nearly all commenters agreed that "[a]t a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language."[21] Although we adopt these general guidelines, we refrain from prescribing a specific font or type size. Long distance telephone companies' marketing campaigns take on many different forms. Their services may be advertised in myriad ways, and in myriad type sizes, depending on the advertising medium and target audience.[22] Therefore, we will allow IXCs the flexibility to design the LOA in a manner that is complimentary to their associated promotional material. However, we will require LOAs to be printed with type of sufficient size and readable type to be clearly legible to the consumer. This means that LOAs must generally be comparable in font and size to their associated promotional material.[23]

B. The LOA as a Separate or Severable Document

13. Our proposal to separate the LOA physically from all promotional materials has drawn both comments favoring it and comments questioning it. Specifically, we proposed that "[t]he letter of agency shall be a separate document whose sole purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change. ... The letter of agency shall not be combined with inducements of any kind on the same document."[24] The opponents of our proposal argue that this proposed

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[20] Section 64.1150(e).

[21] Proposed section 64.1150(e).

[22] IXCs may advertise their service offerings in magazines, newspapers, and on airline ticket jackets.

[23] For example, the use of "fine print" in the drafting of LOAs will be prohibited.

[24] Section 64.1150(b), (c).

rule "may" be found unconstitutional[25] and that it "goes farther than is necessary" to protect consumers from slamming.[26] Proponents of our proposed rule argue that separating the LOA from inducements is necessary to ensure that consumers will be clearly informed as to the actions they are being asked to make.[27] In fact, some commenters contend we do not go far enough to protect consumers.[28] In response to these comments, we first address whether the First Amendment to the Constitution[29] would permit us to require the LOA to be a separate document. Then, we address whether it is in the public interest for us to adopt this requirement.

1. First Amendment Considerations

a. Comments

14. Among the commenters on the First Amendment issue, MCI's argument is the most detailed. MCI argues that the proposed rule, as written, may be unconstitutional because "[w]here commercial speech is accurate -- i.e., not inherently misleading or deceptive -- the government's ability to regulate that speech is limited."[30] MCI contends that "[a]ny court reviewing the proposed rules would undoubtedly analyze their Constitutionality by applying a Commercial Free Speech analysis."[31] Under that analysis, MCI maintains that "a court would view the speech which the proposed

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25 See Comments and Replies of AT&T, MCI and One Call Communications, Inc.(One Call).

26 See Comments AT&T, MCI, ACC Corporation (ACC Corp.), and Lexicom, Inc. (Lexicom).

27 See Comments of Sprint Communications Co. (Sprint), Competitive Telecommunications Association (CompTel), and Missouri PSC.

28 See Letter from Illinois Congressional Delegation, note 77, infra (Commission should consider absolving consumers of all toll charges accessed by unauthorized carriers), and Comments of Southwestern Bell and NYNEX (Commission should prescribe specific language for LOA), NAAG (Commission should require that all change orders be followed by written confirmation), and Pacific Bell and Nevada Bell (monetary penalty should be imposed on IXCs whose complaints evidence a pattern of abuse).

29 U.S.C.A. Const. Amend. 1.

30 MCI Comments at 10.

31 Id. at 9 (citing Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980)(Central Hudson)(Supreme Court generally considers commercial speech to be "expression related solely to the economic interests of the speaker and its audience"); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)(Virginia Bd. of Pharmacy); Edenfield v. Fane, 113 S. Ct. 1792 (1993)).

rules intended to regulate as not inherently misleading"[32] because "any attendant advertising or marketing [attached to an LOA] can be presented in a way which is not misleading."[33] Therefore, MCI argues, the combined LOA/inducement cannot be inherently misleading. Further, MCI contends that the heart of the Commission's concern is directed not at eliminating inherently misleading speech but, rather, at eliminating potential confusion regarding the effect of the LOA form.[34] Finally, MCI maintains that "the Commission would have difficulty showing that the regulation is no more restrictive than necessary to meet the governmental objective"[35] of eliminating customer "confusion."

b. Decision

15. Notwithstanding MCI's First Amendment arguments, the rules we have adopted in this proceeding meet the tests set out by the Supreme Court for permissible government regulation of commercial speech under the First Amendment. First of all, the rules adopted in this proceeding do not prohibit any speech, commercial or otherwise. They merely require that the carriers' method of delivery of that speech not confuse or mislead the consumer. The record in this proceeding is replete with comments supporting our conclusion that the present practices of many carriers have confused and misled thousands of consumers into thinking they were participating in some type of activity other than switching their long distance carrier, when, in reality, they were doing exactly that.[36] The regulations that we are adopting are designed to minimize this confusion by requiring that the language of the LOA be clear and unconfusing, contain specific information that will assure that the signer of the LOA can understand exactly what he or she is signing, and separate the LOA from any promotional materials so that the consumer is more likely to be able to differentiate commercial incentives offered by the carriers from the actual commitment to changing his or her primary interexchange carrier.

16. The Supreme Court has held that the government may ban forms of communication more likely to deceive the public than to inform it. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 561 (1980). We have tried to narrowly design our regulations to eliminate deception and yet still permit

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32 Id.

33 Id.

34 Id. at 10 (citing NPRM at 5).

35 Id. at 11.

36 This is evidenced by the large volume of complaints received by this Commission, LECs and state regulatory bodies. See note 2, infra.

the free flow of information.

17. The Supreme Court also has held that it is permissible to use some restrictions on the time, place, and manner of commercial speech provided that they are justified without reference to the content of the regulated speech, that they serve a significant government interest, and that in so doing they leave open ample alternative channels for the communication of the information. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). The rules we adopt here are restrictions in the manner of delivery and meet all of the requirements set out by the Supreme Court. Specifically, we are restricting only the manner in which the material is presented: it must be clear and not confusing, it must include enough information to permit the customer to know what he or she is doing by signing the document and who his or her long distance carrier will be, and it must be separate or severable from other commercial incentives. As for a significant governmental interest, the very process of designating a primary long distance carrier has been established by this Commission as part of the process of providing options to consumers in choosing their interexchange services. We created the LOA as a method for assuring that the consumer's choice was honored and to protect the consumer from unauthorized changes. The sheer volume of complaints that we and the states have received demonstrates that there are still some flaws in the system we have designed and that there is need for refinements to provide protection to the consumers from the present practices that have led to so many unauthorized conversions. Second, we are not prescribing specific language either in the LOA or in any promotional materials; rather we are specifying the minimum information that an LOA must include and have placed no restrictions on any promotional materials.[37]

18. Finally, as indicated above, we have chosen the method of regulation that least impinges on the carriers' free choices of how to promote their services. We are not proposing to restrict IXCs' use of their promotional materials, but merely are specifying that they be separate or severable from the actual document that authorizes a PIC change. Carriers are free to use whatever promotional materials they choose, and whatever avenues for distribution of those promotional materials that they choose. All we are requiring is that they comply with our minimal requirement that the actual document authorizing a PIC change be separate or severable from the promotional materials so that it is clear to the consumer that signing that document will do just that. Our goal is to minimize deceptive promotional practices and still permit the consumer to be informed about her or his choices.

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[37] See para. 10, supra. and paras. 18 and 24, infra.

2. Public Interest Considerations

a. Comments

19. Generally, consumer groups, state regulatory bodies, local telephone companies, some IXCs, and some interexchange resellers support our proposal to separate the LOA from promotional material,[38] while most facility-based IXCs and some resellers oppose this measure.[39] The proponents stress that this provision, above all others, will ensure that consumers will be fully and clearly informed as to the action they must take to effect a PIC change. Sprint contends that "combining the LOA with promotional inducements, such as a vacation contest, the endorsement portion of a check that can be cashed by the consumer, etc., has the potential for outright deception, or at the very least for leading to misunderstandings between consumers and carriers."[40] LDDS states that "the LOA should not be used for any purpose other than to designate the end-user's choice of PIC."[41] LDDS further asserts that "[a]ny ancillary marketing activities should be handled via documents physically separate from the LOA"[42] and that "this should eliminate customer confusion about the purpose of the LOA document itself."[43] Consumer Action "strongly agree[s] that the LOA needs to be on a separate piece of paper that is independent of any inducements such as a check or contest entry form."[44] Consumer Action asserts that "[a] consumer's focus needs to be on the LOA and its implications"[45] and that "[c]ombining it with inducements does nothing but confuse and mislead."[46]

20. Other commenters take a contrary view, however, arguing that this proposal is overbroad. AT&T argues that "[t]he proposed rule absolutely barring combined LOA/inducements goes far beyond what is necessary to protect telephone subscribers from abuses or

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38 For example, Consumer Action, NY Public Service, Sprint, NYNEX, and LDDS Communications, Inc. (LDDS) all supported this provision.

39 For example, AT&T, MCI, and Touch 1 Inc. & Touch 1 Communications, Inc. (Touch 1) opposed this provision.

40 Sprint Comments at 5.

41 LDDS Comments at 5.

42 Id.

43 Id.

44 Consumer Action Comments at 2.

45 Id.

46 Id.

deception, and would impose serious hardships on both consumers and IXCs."[47] AT&T further contends that these problems would be cured by the Commission's "companion proposals in this docket requiring that LOAs clearly and unambiguously set forth in a legible typeface all of the Commission's prescribed disclosures."[48] MCI argues that "[t]hese proposals go far beyond the elimination of sharp practices because they would unfairly impact the legitimate marketing practices of many carriers."[49] America's Carriers Telecommunications Association (ACTA) asserts that "promotions are a useful marketing tool that are favored by both large and small carriers. However, it is the smaller carriers that will be most impacted by the required separation, for such carriers do not have available to them the alternatives of massive advertising campaigns on radio and nationwide television."[50]

b. Decision

21. Based on our investigation of consumer complaints concerning LOAs, we find that abuses have occurred and continue to occur at an increasing rate. Much of the abuse, misrepresentation, and consumer confusion occurs when an inducement and an LOA are combined in the same document in a deceptive or misleading manner. These complaints generally describe apparently deceptive marketing practices in which consumers are induced to sign a form document that does not clearly advise the consumers that they are authorizing a change in their PIC. As we have described above, consumers have complained that the "LOA" forms were "disguised" as contest entry forms, prize claim forms, or solicitations for charitable contributions. The characteristic common to all of these marketing practices is that the inducement is combined with the LOA and the inducement language is prominently displayed on the inducement/LOA form while the PIC change language is not, thus leading to consumer confusion.

22. We believe that consumers and industry alike should be clearly informed as to what will be expected to authorize a change of a consumer's long distance telephone service. Our experience indicates that for fair competition to continue, consumers must have clear and unambiguous information about the actions and the choices they are being asked to make. Although we think that a consumer may reasonably choose to change long distance telephone services because of a carrier's inducements, we are troubled by the number of consumers nationwide who are not given the opportunity to

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47 AT&T Comments at 12.

48 Id. at 13.

49 MCI Comments at 3-4.

50 ACTA Comments at *i*.

make that informed choice because they are deceived by an LOA that is disguised as a contest entry, prize claim form, or charitable solicitation. We believe that the only way to ensure that the consumer can always make a truly informed choice from now on is to require that the LOA be a separate or severable document.[51] The LOA must therefore be a separate document or must be severable -- for example, attached by perforations that, when torn out, contains only authorizing language. Under this requirement, no IXC will be able to mix its promotional materials with the LOA in a deceptive or confusing manner.

23. Although this rule may require some IXCs to change certain details in their use of such promotional tools, we do not believe that our rule will seriously affect the basic effect and function of the IXCs' marketing campaigns. With regard to charitable solicitations, or contest and sweepstakes entries, IXCs can simply use their promotional materials to encourage consumers to sign the LOA. For example, it is conceivable that an LOA might be in the form of a postage-paid postcard attached along the "inner spine" of a magazine facing the IXCs' advertisement touting its service and inducements. It is also conceivable that an IXC might use a postage-paid postcard LOA that is initially attached to an airline ticket jacket by a perforated edge. The promotional materials and inducements would be relegated to the "jacket" portion of the airline ticket jacket and the LOA, a separate and distinct form, could be torn from the "jacket" portion and mailed separately. Finally, those IXCs using "one-page" promotional materials could employ a variation of this approach. They could use a single sheet with the IXC's promotional inducements on the top portion of the sheet and a separable postcard LOA on the bottom, initially attached to the sheet by perforations, but ultimately detached from the sheet and mailed. If our rules are followed and the LOA is properly captioned, consumers should be clearly informed as to the action they are being asked to take. In light of this discussion, we believe that the benefits gained by better informed consumers outweigh the possibilities of slightly decreased marketing flexibility that some IXCs might experience.

24. MCI mistakenly construes our proposal as unreasonably restricting the use of their promotional materials. MCI argues that "[w]ithout defining impermissible 'inducements,' it is impossible to distinguish between legitimate commercial incentives, as distinct from deceptive practices that ought to be prohibited. If the Commission is seeking to foreclose all promotional materials or advertisements used with LOAs, its proposal is too sweeping."[52]

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[51] As discussed in paragraphs 25 and 26, infra., we make a limited exception to this general "separate or severable document" rule in our handling of "PIC change" checks.

[52] MCI Comments at 5.

Contrary to MCI's assertions, we are in no way prohibiting the use of marketing campaigns that include contest or sweepstakes entries, charitable solicitations, or checks. We are merely taking the limited, necessary step of separating the Commission-prescribed authorizing document from the commercial inducements.[53] We take this action because thousands of consumers have complained to us and tens of thousands more have complained to their LECs and state regulatory bodies that when they enter the contests, claim the prizes, or respond to the charity solicitations employed by some IXCs, they did not intend to switch their long distance carriers.

25. We do, however, believe a limited exception should be made for PIC change checks. Although some IXCs have used checks to mislead and deceive consumers to change their PICs, we recognize that other IXCs use checks in their marketing campaigns in an appropriate and non-misleading manner, which have resulted in minimal consumer complaint. AT&T and MCI assert that their "PIC change" checks are clear and unambiguous and clearly inform the consumer that signing such a check will result in a PIC change. Both companies claim that their marketing material accompanying the check also informs the consumer that signing the check will result in a PIC change. Both companies also cite the absence of consumer complaints against their respective check marketing strategy as evidence that this form of marketing should not be prohibited by our "separate document" LOA proposal.[54]

26. We are persuaded by the arguments of AT&T and MCI, notwithstanding our negative experience with some IXCs that deceptively use checks to market their services. In an effort to narrowly tailor our requirements, we find that the checks that some carriers, such as AT&T and MCI use as LOAs can be excepted from our "separate or severable document" requirement. Generally, such checks contain only the required LOA language and the necessary information to make them negotiable instruments (bank account number, payee's name, amount, etc.). When an "inducement" check does not contain additional promotional information, we think that it is unlikely that consumers will be unable to discern that the primary purpose of the check is to authorize a PIC change. Typically, a "PIC change" check from these IXCs contains a banner title that reads "Endorse Check to Switch to ..." or "Endorsement of this Check Switches Your Long Distance Service to ...." Indeed, a survey of the consumer complaints that we have received reveals that these checks are seldom the source of actual unauthorized

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[53] This action is a far less restrictive alternative than requiring the LOA and promotional material to be in separate envelopes. See Comments of Southwestern Bell.

[54] See Comments of AT&T and MCI.

conversions.[55] To ensure that such checks do not mislead or confuse consumers, we shall require that a valid LOA/inducement check contain only the required LOA language and the necessary information to make it a negotiable instrument, and shall not contain any promotional language or material. We require carriers to continue to place the required LOA language near the signature line on the back of the check. In addition, we shall require that carriers print, in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a PIC change by signing the check. We think that this additional safeguard, along with all other requirements applicable to LOAs,[56] will ensure that consumers are not confused or misled when carriers use inducement checks as a marketing tool.[57]

27. We want to emphasize that this provision should reduce complaints against most IXCs because consumers should be on clear notice that they are changing their long distance telephone service. Further, consumers and this Commission should, under this requirement, be better able to identify intentionally misleading practices. IXCs should easily be able to fashion LOAs that will be unlikely to engender complaints and thereby come under Commission scrutiny. We see serious problems with less specific LOA requirements that, under the guise of permitting more marketing "flexibility," would effectively require us to scrutinize many, perhaps most, LOAs in response to consumer complaints, as is now the case.[58] Such a result would, we think, be much more intrusive than our new rule, which should remove most LOAs from the realm of dispute. Therefore, we adopt the rule to require the LOA to consist of a separate or severable document -- that is, a document containing the minimum language required to authorize a PIC change as described in Section 64.1150(e), printed with a type of sufficient size and readable type to be clearly legible with no

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[55] However, we have received several informal complaints objecting to the use of checks for this purpose, even though no unauthorized conversion has actually taken place.

[56] In other words, checks that are used as LOAs must satisfy all requirements applicable to LOAs.

[57] We will exercise our discretion in making any further exceptions to our "separate or severable document" rule.

[58] We encourage entities such as LECs to take additional steps that might help reduce slamming in their service areas. The California PUC states, and AT&T acknowledges, that Pacific Bell has "an option for their customers known as a [PIC] freeze. Under this option the customer must contact his local exchange carrier in order to change his long distance carrier. IXCs are not allowed to act as agents.... [Pacific Bell] usually mention[s] this option to customers once they have been slammed. One idea is to have LECs provide customers with this option before they have been slammed." California PUC Comments at 4-5.

inducements. We believe that this requirement will prevent certain current deceptive or confusing marketing practices, while recognizing the need of the industry for flexibility to market services to consumers.[59]

C. Other Unauthorized Conversion Issues

1. The Carrier Named on the LOA

28. In the NPRM, we sought comment on whether LOAs should contain only the name of the carrier that directly provides the interexchange service to the consumer. We recognize that there may be more than one carrier technically involved in the provision of long distance service to a consumer. For example, there may be an underlying carrier whose facilities provide the long distance capacity and a resale carrier that actually sets the rates charged to the end user consumer. In some cases, there also may be a carrier that acts as a billing and collection or marketing agent.

29. Most commenters agreed that only the name of the IXC setting the consumer's rates should appear on the LOA. Some resellers opposing this requirement claim that some consumers will not give them their business because the consumers want their telephone service handled by a large carrier. These commenters argue that allowing the small IXC reseller to use the name of the larger underlying carrier is not confusing to consumers and is necessary to bolster consumer confidence. Based on numerous consumer complaints, we conclude that it is in fact confusing to consumers for an LOA to contain the name of an IXC that is not providing service directly to the consumer. Because our rules only affect the LOA and not promotional materials, small IXCs may choose to use those materials to promote their affiliations with larger carriers in order to gain greater consumer acceptance. The LOA may not be used for such a purpose, however. Therefore, we will only permit the name of the rate-setting IXC on the LOA.[60]

30. In a related matter, several LECs have informed the Commission, that in some cases where the reseller sets the rates, consumers may be confused because the name of the underlying, facilities-based IXC may appear on the consumer's bill. BellSouth Telecommunications, Inc. (BellSouth) states that "currently the provider of interexchange service named on a customer's telephone bill rendered by BellSouth is determined by the carrier

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[59] The rule adopted here would, for example, prohibit the use of forms that combine LOAs with the language of contest entries, prize claims and charitable solicitations.

[60] We modify the proposed Section 64.1150(e)(4) to accommodate this and the multiple PIC issue, paragraph 32, infra.

identification code (CIC). CICs are issued by Bellcore to facility-based IXCs. Thus, BellSouth has no present capability for bill identification of companies which market to end users but do not own transmission facilities and do not have a CIC. Such capability could be achieved through the creation of a coding system to assign and maintain pseudo-CICs for non-facility-based IXCs."[61] Although BellSouth states that it might be able to institute such a system within a year, BellSouth asserts that a national system of code administration and maintenance is preferred.

31. We recognize that consumers may be confused if after they agree to switch their long distance service, the name of some other IXC appears on their bill. We expect all IXCs that do not have a CIC to explain to their new customers that another IXC's name may appear on the customer's bill. The IXC may also describe any relationship it has with the IXC named on the bill. Further, we urge LECs such as BellSouth to develop a coding system to assign and maintain pseudo-CICs for non-facility-based IXCs. We defer a full examination of this issue to another proceeding.

32. Finally, certain commenters have informed the Commission that the jurisdictions they operate in either allow for two primary interexchange carriers ("2 PICs")[62] or will likely allow "2 PICs" in the near future.[63] Typically, these jurisdictions allow for a separate inter-state IXC and an intra-state IXC.[64] Consumers may choose an IXC to provide them with either inter-state service, intra-state service, or both. Our proposed Section 64.1150(e)(4)[65] does not contemplate such a scenario and therefore we will modify the rule provision to accommodate 2-PIC jurisdictions as follows:

> [The LOA must state] that the subscriber understands that only one interexchange carrier may be designated as the subscriber's interstate primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary

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61 Comments of BellSouth at 2.

62 See Comments and Replies of Allnet, Ameritech, GCI and GTE.

63 See Reply Comments of Ameritech at 2.

64 In the case of GTE Hawaiian Telephone Company Incorporated (GTE Hawaiian), the choices entail an international carrier and a interstate (mainland United States) carrier. GTE Comments at 3.

65 The proposed Section 64.1150(e)(4) states "...that the subscriber understands that only one interexchange carrier may be designated as the subscriber's primary interexchange carrier for any one telephone number and that selection of multiple carriers will invalidate all such selections...."

> interexchange carriers (e.g., for intrastate or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interstate primary interexchange carrier and a subscriber's intrastate primary interexchange carrier....[66]

We note that the rule provision will, in effect, continue as originally proposed in those jurisdictions that do not recognize 2-PIC, which at the adoption of these rules represents the vast majority of the jurisdictions in the United States. This rule provision should, however, be flexible enough to accommodate any new 2-PIC jurisdictions in the future.[67]

2. Business vs. Residential Presubscription

33. The Commission sought comment on whether business and residential customers should be treated differently with respect to our LOA requirements. Unlike the situation with many residential customers, LOA forms sent to businesses may not be received and processed by the person authorized to order long distance service for the business. In such a situation, even an LOA that is signed may result in an unauthorized change because the person who signed the LOA had no authority to do so. Most commenters contend that business and residential customers should be treated the same, "as long as the requirements are reasonable for both types of customer."[68] One of these commenters contends that

> if an LOA is clear and legible, it should not be subject to different rules based on the type of service provided. Carriers may have legitimate business reasons to combine marketing campaigns for different kinds of services, and may not even be able to distinguish between business and residence lines (e.g., where a business operates from the home).[69]

Further, some suggest that a line be included on both the residential and the business LOA that indicates that the person

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[66] Section 64.1150(e)(4).

[67] We will allow the inclusion of both the inter-state PIC and the intra-state PIC on the same LOA. Each PIC named must be the rate-setting IXC for its service area.

[68] Comments of ACC Corp. at 6.

[69] Id.

signing the LOA is the person authorized to order service.[70]

34. We are persuaded that there should be no distinction between business and residential customers with respect to our new LOA rules. Further, we do not believe it necessary at this time to require a line on the LOA indicating who is qualified to authorize a PIC change. This may be an addition that a prudent IXC may include on an LOA, because it remains the responsibility of the IXC to determine the responsible party in such a contractual arrangement. The validity of an LOA will continue to depend on it having been signed by a person authorized to make the presubscription decision.

3. Consumer Liability Issues

35. In the NPRM, we asked whether any adjustments to long distance telephone charges should be made for consumers who are the victims of unauthorized PIC changes. Specifically, we asked whether consumers should be liable for the long distance telephone charges billed to them by the unauthorized IXC and if so, to what extent. We sought comment on whether consumers should be liable for: (a) the total billed amount from the unauthorized IXC; (b) the amount the consumer would have paid if the PIC had never been changed; or (c) nothing at all.

36. The majority of commenters support option (b), the "making whole" approach. These commenters contend that consumers should be liable to the unauthorized carrier for the amount they would have paid if the PIC had never been changed. Consumer groups, some state regulatory bodies, and some local telephone companies argue that the only way to stop slamming is to deny the "slammer" revenue and the only way to do that is to absolve consumers of all billed toll charges from unauthorized IXCs.[71] In addition, the Illinois Congressional Delegation has expressed its concern "that many long-distance customers that have experienced this unauthorized switch in their service are forced to pay for services they did not order or knowingly approve."[72] It has asked the Commission to "examine the possibility of proposing a rule that

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[70] Comments of NAAG at 8.

[71] See Comments of Consumer Action, New York Public Service and Southwestern Bell.

[72] Letter from Senator Carol Moseley-Braun, Senator Paul Simon, Representative Glenn Poshard, Representative Cardiss Collins, Representative Jerry Costello, Representative Richard Durbin, Representative Lane Evans, Representative Luis Gutierrez, Representative Mel Reynolds, Representative William Lipinski, Representative Dennis Hastert, and Representative Sidney Yates to Reed E. Hundt, Chairman, Federal Communications Commission, January 12, 1995.

will allow victims of 'slamming' to forfeit responsibility for charges billed by the long-distance company which switched their service without proper authorization."[73] Opponents of forgiving all charges argue that such a policy would lead to consumer fraud in that it "would provide the unscrupulous with an incentive to claim wrongful conversion in order to avoid payment of legitimate long distance charges."[74] They claim that such a policy "would also impose undue penalties on carriers that had converted a consumer to their service in good faith only to find that the spouse or a relative from whom they had received authority for the PIC change was not actually empowered to grant that authority."[75]

37. Despite the compelling arguments of those favoring total absolution of all toll charges from unauthorized IXCs, we are not convinced that we should, as a policy matter, adopt that option at this time. The "slammed" consumer does receive a service, even though the service is being provided by an unauthorized entity. The consumer expects to pay the original rate to the original IXC for the service.[76] Except for the time and inconvenience spent in obtaining the original PIC, consumers are not injured if their liability is limited to paying the toll charges they would have paid to the original IXC. We recognize, however, that this may not be the best deterrent against slamming. Some IXCs engaging in slamming may not be deterred unless all revenue gained through slamming is denied them. We will investigate future slamming cases with the question of consumer liability in mind. At this time, we believe that the equities tend to favor the "make whole" remedy and therefore support the policy of allowing unauthorized IXCs to collect from the consumer the amount of toll charges the consumer would have paid if the PIC had never been changed. We expect all unauthorized IXCs to cooperate with consumers in the proper settlement of these charges. Failing this, through the complaint process, we will prohibit unauthorized IXCs from collecting more than the original IXC's rates. However, we recognize that if "slamming" continues unabated -- perhaps through abuses in areas other than the use of the LOA -- we may have to revisit this question at a later date.

38. We also asked the public to comment on the effect that unauthorized PIC changes have on optional calling plans and the

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[73] Id.

[74] See Comments of MIDCOM Communications Inc. (MIDCOM) at 12.

[75] Id.

[76] Of course, this assumes that the telephone service is comparable in all relevant aspects. A slammed consumer may have a cause of action through the Commission's complaint process to reduce the amount paid to the unauthorized IXC if the service of the unauthorized IXC is demonstrably inferior to that of the original IXC.

consumers enrolled in them. In cases of unauthorized PIC changes, the consumer may not be aware of the change for at least one billing cycle. Often, these consumers continue to pay a flat, minimum monthly charge to their previous carrier for a discount calling plan despite the fact that they are no longer presubscribed to that carrier.[77] Most commenters agree that consumers should not be liable for optional calling plans if they are no longer connected to their original carrier, but several differ on exactly how the consumer should recoup their loss. Most commenters contend that the consumer should simply be absolved of all calling plan liability from the moment the consumer is slammed.[78] Several commenters contend that the original carrier should bill the offending carrier for the lost revenue.[79] Some commenters suggest that however it decides to handle consumer liability issues, the Commission should not expect LECs to resolve consumer/IXC disputes.[80]

39. We agree with the majority of commenters that the equities strongly favor absolving slammed consumers from liability for optional calling plan payments. It is reasonable that consumers should not have to pay for services they cannot enjoy in the manner they had contemplated. For example, consumers that only receive discounts on their residential telephone service as a benefit in return for optional calling plan premiums should not have to continue to pay those premiums if their residential telephone service is slammed. However, there may be cases where consumers receive benefits in addition to their presubscribed telephone service discounts, such as the use of a domestic or international "calling card," not associated with a presubscribed telephone number. In such cases, consumers should be liable for some calling plan payment even if the presubscribed service has been changed, as long as those consumers are clearly informed upon initiation of the optional calling plan. Consequently, we will not allow IXCs to collect optional calling plan premiums for slammed consumers, unless the IXC has stated clearly in its tariff that its presubscribed customers are liable for calling plan premiums in compensation for benefits in addition to the customer's presubscribed service, even if the presubscribed service is

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77 These consumers may still access the previous IXC's long distance service by using an access code or through the use of any "calling cards" issued by the IXC to the consumer, but it is unlikely that many consumers intend to use an optional calling plan only in this manner.

78 See Comments of Southwestern Bell, New York Public Service and Hertz Technologies, Inc. (Hertz Technologies).

79 See Comments of MIDCOM, Telecommunications Resellers Association and Touch 1.

80 See Comments of Pacific Bell and Nevada Bell and GTE.

changed. The IXC will be required to give prior notice to its customers regarding its additional benefits and its compensation expectations through its tariff and its customer service material.

4. Fully Translated LOAs

40. The non-English speaking population represents a growing market in this country that IXCs are targeting for their domestic and international business. Some of these consumers have alleged that the non-English versions of the LOA do not contain all of the text of the English versions of the LOA. As a result, material portions of the LOA are in only one language, typically English, which the non-English speaking consumers may not fully understand. We sought public comment on whether we should adopt rules to govern bilingual or non-English language LOAs.[81] Specifically, we asked whether we should require all parts of an LOA translated if any parts were translated. The overwhelming majority of commenters stated that we should adopt such a rule. We agree that such a requirement is necessary to ensure that all consumers can make informed choices. Therefore, we require all IXCs that choose to translate any part of the LOA to translate all parts of the LOA and consequently, we adopt Section 64.1150(f).[82]

5. LOA Title

41. Consumer groups, state regulatory bodies, and resellers contend that a consumer may be less confused and more informed if the LOA is titled in a more understandable style.[83] For example, commenters suggest titling the LOA document: "An Order to Change My Long Distance Telephone Service Provider," "Application to Change My Long Distance Company," or "Order Form to Change My Long Distance Telephone Service." Although we will not prescribe a particular title for the LOA, we agree with these commenters and strongly suggest that all IXCs use a clear, easily understandable title.

6. Consumer-Initiated Calls

42. Finally, we asked the public how consumers have been affected by the IXC marketing practice of "encouraging" consumers to authorize a PIC change when they call an IXC's business number for other reasons. Typically, the consumers, in response to an

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[81] We intend that all of our rules and policies adopted in this proceeding apply to bilingual or non-English LOAs as well as English-language LOAs.

[82] If any portion of a letter of agency is translated into another language, then all portions of the letter of agency must be translated into that language.

[83] See Comments of Consumer Action, New York Public Service and ACTA.

advertisement, are just requesting general information about the IXC and do not intend to initiate a PIC change. We are persuaded by some commenters, resellers, local telephone companies, and consumer groups who advocate extending the Commission's PIC verification procedures to consumer-initiated calls.[84] Some commenters, however, argue that because the IXC does not initiate the call, the PIC order is not generated by telemarketing and, thus, the order verification protections in Section 64.1100 of our rules should not apply.[85] Those commenters fail to explain adequately why a consumer who initially places a call to an IXC's business number, presumably searching for information, should benefit less from rules designed to curb deceptive practices than the consumer receiving a call from a telemarketer. We are not convinced there is enough of a difference between the two situations as to justify such vastly different treatment. We agree with Consumer Action that consumers "responding to a 30-second television ad ... calling to get answers to questions ... are as subject to unauthorized conversion as a consumer who was called at home."[86] We also agree that upon adoption of our rules, some "IXCs may switch from mailing inducement-laden LOAs to mailing marketing pieces in which a consumer is urged to call an business number in order to receive a promised inducement"[87] where "[a]n unauthorized conversion could easily take place on such a call."[88] Therefore, we will extend PIC verification procedures to consumer-initiated calls to IXC business numbers.

7. Preemption of State Law

43. Although we did not seek comment on the matter, some of the resellers urged the Commission to preempt inconsistent state law with regard to "slamming."[89] These commenters generally argue that "[t]he Commission's LOA requirements should be applied nationwide and the individual states should not be allowed to impose their own LOA requirements in addition to those of the Commission."[90] None of these commenters, however, cites specific state regulations that warrant federal preemption. At most, ACTA asserts that "two state public utility commissions, Florida and South Carolina, ... currently have on-going proceedings concerning

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84 See Comments of Touch 1, GTE and Consumer Action.

85 See Comments of AT&T at 22 and MCI at 14.

86 See Comments of Consumer Action at 3-4.

87 Id.

88 Id.

89 See Comments of ACC Corp., ACTA and One Call.

90 Comments of One Call at 5, n.12.

the rules for consumer selection of interexchange carriers."[91] Until and unless we receive specific allegations of specific state statutes that warrant federal preemption, we cannot consider or act on these commenters' requests for federal preemption. We note that the record shows that state action regarding "slamming" appears to be consistent with our own. Therefore, we decline at this time to preempt any state law regarding the unauthorized conversion of consumer's long distance service. We will consider specific preemption questions on a case-by-case basis.

IV. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

44. **Need for Rules and Objective.** We have adopted rules designed to protect consumers from unauthorized switching of their long distance carriers and to ensure that consumers are fully in control of their long distance service choices.

45. **Issues Raised by the Public in Response to the Initial Regulatory Flexibility Analysis.** No comments were received specifically in response to the Initial Regulatory Flexibility Analysis.

46. **Alternatives that would lessen impact.** We have considered alternatives suggested in the record and have found that they would not be comparably effective. Small entities may feel some economic impact in additional printing costs because of these new letter of agency requirements. Because the rules will not take effect for sixty (60) days, we believe all IXCs, large and small, will have sufficient advance time to revise and print new LOAs.

V. CONCLUSION

47. In this Report and Order, we have adopted rules clearly delineating what must be included in an LOA document and, equally important, what may not be included in an LOA document. These rules are intended to limit the contents of an LOA document so that its sole purpose and effect are to authorize a PIC change. The proposed restrictions should eliminate consumer confusion about the intent and function of the LOA. Further, our policy decisions should further clarify our position regarding other "slamming" issues. We wish to make clear that although our evolutionary approach to the "slamming" problem has generally been one of regulatory restraint, we will not tolerate continued abuses against consumers and may revisit this question if warranted.

48. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose

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[91] Comments of ACTA at 11.

new and modified third party reporting requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VI. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 303(r), that 47 C.F.R. Part 64 is amended as set forth in the Appendix B.

50. IT IS FURTHER ORDERED, that the Chief of the Common Carrier Bureau is delegated authority to act upon matters pertaining to implementation of the policies, rules, and requirements set forth herein.

51. IT IS FURTHER ORDERED, that this Report and Order will be effective sixty (60) days after publication of a summary thereof in Federal Register.

FEDERAL COMMUNICATION COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Comments Filed

ACC Corporation
Allnet Communication Services, Inc.
America's Carriers Telecommunications Association
AT&T Corp.
Communications Telesystems International
Competitive Telecommunications Association
Consumer Action
Florida Public Service Commission
Frontier Communications International Inc.
General Communication, Inc.
GTE Service Corporation
Hertz Technologies, Inc.
Hi-Rim Communications, Inc.
Home Owners Long Distance, Inc.
L.D. Services, Inc.
LDDS Communications, Inc.
Lexicom, Inc.
MCI Telecommunications Communications Corporation
MIDCOM Communications Inc.
Missouri Public Service Commission, et al.
National Association of Attorneys General, et al.
New York Department of Public Service
NYNEX Telephone Companies
One Call Communications, Inc.
Operator Service Company
Pacific Bell and Nevada Bell
People of the State of California, et al.
Public Utility Commission of Texas
Southwestern Bell Telephone Company
Sprint Communications Co.
State of Michigan, Attorney General
State of Wisconsin, Attorney General
State of New York, Attorney General
Telecommunications Company of the Americas, Inc.
Telecommunications Resellers Association
Touch 1, Inc. and Touch 1 Communications, Inc.
William Malone

Reply Comments Filed

ACC Corporation
Alabama Public Service Commission
Allnet Communication Services, Inc.
Ameritech Operating Companies
AT&T Corp.
Bell Atlantic Telephone Companies
BellSouth Telecommunications, Inc.

Commonwealth Long Distance
Communications Telesystems International
Competitive Telecommunications Association
Custom Telecommunications Network of Arizona, Inc.
General Communication, Inc.
GTE Service Corporation
Hi-Rim Communications, Inc.
L.D. Services, Inc.
LDDS Communications, Inc.
Local Area Telecommunications, Inc.
MCI Telecommunications Communications Corporation
National Association of Regulatory Utility Commissioners
Oncor Communications, Inc.
One Call Communications, Inc.
Operator Service Company
Pennsylvania Public Utility Commission
Pacific Bell and Nevada Bell
Southwestern Bell Telephone Company
Sprint Communications Co.
Telecommunications Resellers Association

APPENDIX B

Part 64 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.

2. Part 64, Subpart K, is amended by amending Section 64.1100(a) to read as follows:

§ 64.1100 Verification of orders for long distance service generated by telemarketing.

*****

(a) The IXC has obtained the customer's written authorization in a form that meets the requirements of Section 64.1150, below.

*****

3. Part 64, Subpart K, is amended by adding Section 64.1150 to read as follows:

§ 64.1150 Letter of Agency Form and Content

(a) An interexchange carrier shall obtain any necessary written authorization from a subscriber for a primary interexchange carrier change by using a letter of agency as specified in this section. Any letter of agency that does not conform with this section is invalid.

(b) The letter of agency shall be a separate document (an easily separable document containing only the authorizing language described below) whose sole purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change.

(c) The letter of agency shall not be combined with inducements of any kind on the same document.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of agency may be combined with checks that contain only

the required letter of agency language prescribed in paragraph (e) below and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain, in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a primary interexchange carrier change by signing the check. The letter of agency language also shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

1) the subscriber's billing name and address and each telephone number to be covered by the primary interexchange carrier change order; and

2) the decision to change the primary interexchange carrier from the current interexchange carrier to the prospective interexchange carrier; and

3) that the subscriber designates the interexchange carrier to act as the subscriber's agent for the primary interexchange carrier change; and,

4) that the subscriber understands that only one interexchange carrier may be designated as the subscriber's interstate primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intrastate or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interstate primary interexchange carrier and a subscriber's intrastate primary interexchange carrier; and

5) that the subscriber understands that any primary interexchange carrier selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber's primary interexchange carrier.

(f) Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current interexchange carrier.

(g) If any portion of a letter of agency is translated into another language, then all portions of the letter of agency must be translated into that language.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-230
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the	)	
Commission's Rules With Regard to	)	MM Docket No. 94-131
Filing Procedures in the Multipoint	)	
Distribution Service and in the	)	
Instructional Television Fixed Service	)	
	)	
and	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act - Competitive Bidding	)	

REPORT AND ORDER

Adopted: June 15, 1995; Released: June 30, 1995

By the Commission: Chairman Hundt dissenting in part and issuing a statement; Commissioners Quello and Barrett issuing separate statements; and Commission Ness dissenting in part and issuing a statement.

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I. INTRODUCTION AND SUMMARY

1. By this action, we adopt rules to facilitate the development and rapid deployment of wireless cable services.[1] As a result of our actions in prior proceedings, wireless cable operators that use spectrum in the Multipoint Distribution Service (MDS), often

[1] Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels. Our use of the term "wireless cable" does not imply that it constitutes cable television for statutory or regulatory purposes.

supplemented with leased channels from the Instructional Television Fixed Service (ITFS), have begun to provide a competitive alternative to wired cable and other multichannel video programming distributors.[2] The rules we now adopt will accelerate that process by setting streamlined measures to distribute unused MDS spectrum through competitive bidding and by establishing a protected service area for MDS stations that is large enough to allow operators flexibility they need to design viable and competitive wireless cable systems. Adoption of these rules will enable the Commission to lift the current freeze on filing new MDS applications.[3]

2. Specifically, we adopt in this order a licensing plan under which we will allot, through a simultaneous multiple round bidding process, one MDS authorization for each of the 487 Basic Trading Areas (BTAs) and six additional BTA-like geographic areas.[4] A BTA authorization holder will be able to construct facilities to provide wireless cable service over any usable MDS channels within the BTA, and will have preferred rights to the available ITFS frequencies and ITFS lease agreements within the BTA. A channel is usable if the proposed station design is in compliance with the Commission's interference standards.

3. Under the new rules, the signals of a BTA authorization holder cannot interfere with those of any other BTA authorization holder. Recognizing, however, that BTA lines do not always track desired service areas, the rules permit BTA authorization holders to negotiate interference protection rights. In addition, the rules we adopt require BTA authorization holders to honor the protected service areas of incumbent MDS operators within their BTAs. In a companion order, also adopted today, the Commission expanded the protected service areas of existing MDS stations.[5] These various licensees and applicants that are authorized or proposed on or before June 15, 1995, including those stations that are subsequently modified, renewed or reinstated, are referred to throughout this *Report and Order* as "authorized or previously proposed facilities" or "incumbents." In order to facilitate the development of successful wireless cable systems, the rules permit BTA authorization holders to assign or transfer their entire BTAs, or partitioned portions of it, to incumbents or other parties. (Unserved areas may be included as long as the assignment or

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[2] Unless otherwise indicated, "MDS" includes single channel Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) applications and authorizations collectively.

[3] The Commission imposed a freeze on the filing of applications for new MDS stations in *Notice of Proposed Rulemaking* in PR Docket No. 92-80, 7 FCC Rcd 3266 (1992).

[4] Rand McNally defined 487 BTAs in the *1992 Commercial Atlas & Marketing Guide*. Since Rand McNally did not include a few areas, we will add them to the list as BTA-like geographic areas, bringing the total to 493 authorizations to be auctioned. *See infra* at ¶ 37.

[5] *Second Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113, FCC 95-231 (released June 21, 1995) (*Second Order on Reconsideration*).

transfer takes place within the five-year build-out period that the rules impose.) Because the BTA authorization holder may be an incumbent, the rules permit the aggregation of existing and new MDS and ITFS channels within a BTA.

4. The *Report and Order* also adopts a variety of measures to streamline the application and implementation processes. It authorizes, for example, the voluntary use of electronic filing for new MDS applications, as well as electronic fee payments. It institutes computerized interference studies utilizing new data elements to be included in a revised MDS application form. It also makes clear that interference disputes are to be resolved, in the first instance, through private negotiations, with the Commission to serve only as a last resort.

5. We understand that the wireless cable industry has made tremendous progress toward the transition to digital transmission.[6] The rules we adopt today will facilitate that transition.

II. BACKGROUND

6. The origin of MDS dates back to 1970, when the Commission removed a limitation on the authorized bandwidth for licensees utilizing the 2150-2160 megahertz (MHz) frequency band.[7] This action led to numerous applications which proposed to use this spectrum for the distribution of television programming from a central location to subscribers at many points. The Commission subsequently determined that the point-to-point service rules were not appropriate for a service that had become a point-to-multipoint service and in 1974, adopted rules to establish the Multipoint Distribution Service.[8] These rules provided for two MDS channels, each consisting of 6 MHz, in the 50 largest metropolitan areas. In the rest of the country, though one 6 MHz channel is available, the second channel bandwidth is 4 MHz and it cannot be used to transmit a standard television signal, which requires 6 MHz of spectrum. In 1983, to satisfy a growing demand for the delivery of video entertainment programming to subscribers and to provide competition to wired cable systems, the Commission reallocated eight of the then twenty-eight ITFS channels for MDS use, and authorized ITFS licensees to lease the excess capacity on their systems to wireless cable

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[6] *See, e.g.*, The Wireless Cable Association International, Selected Papers from the First Annual Wireless Cable Technical Symposium (February 4-6, 1995).

[7] *Memorandum Opinion and Order, In the Matter of Part 21, Section 21.703(g) and (h) of the Commission's Rules,* 47 FCC 2d 957 (1970).

[8] *Report and Order, Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616 (1974), *recon. denied*, 57 FCC 2d 301 (1975).

operators.[9] That action created wireless cable as a multichannel video distribution medium, and in 1991, the Commission made more channels available for wireless cable services.[10] Today, there are a maximum of thirty-three microwave channels used for wireless cable in each market. These include thirteen MDS channels (Channels 1, 2 or 2A, E1-E4, F1-F4 and H1-H3) and the excess capacity on up to twenty ITFS channels (Channels A1-A4, B1-B4, C1-C4, D1-D4 and G1-G4).[11]

7. Wireless cable is now similar to wired cable television in the type of programming it provides, but differs from cable in how the programming is transmitted to subscribers. Generally, a wireless cable system may be described as a microwave station transmitting on a combination of MDS and ITFS channels to numerous receivers with antennas, such as single family residences, apartment complexes, hotels, educational institutions, business entities and governmental offices. The range of the transmission depends upon the transmitter power, the type of receiving antenna and the existence of a line-of-sight path between the transmitter or signal booster and the receiving antenna.

8. Over the past few years, the wireless cable industry has experienced substantial growth and has emerged as an effective competitor to wired cable in many locations.[12] This rapid growth is due, in part, to program access provisions and changes in other regulations

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[9] *Report and Order* in Gen. Docket No. 80-112 and CC Docket No. 80-116, 94 FCC 2d 1203 (1983). Therein, the Commission also grandfathered interference protection to existing ITFS applicants, permittees or licensees on these eight E and F channels, resulting in twenty-eight ITFS channels in some locales.

[10] The Commission reallocated the H group channels from the Operational Fixed Service to MDS and made MDS operators eligible for authorization on vacant ITFS channels with specified restrictions. *Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6793-94, 6801-06 (1991), *recon. denied*, 7 FCC Rcd 5648 (1992). Last year, the Commission consolidated processing of MDS and ITFS applications into one organization. *Amendment of Parts 0 and 1 of the Communication's Rules to Reflect a Reorganization of Multipoint and Multichannel Multipoint Distribution Services*, 9 FCC Rcd 3661 (1994).

[11] MDS channel 2A is only 4 MHz wide and lacks sufficient bandwidth to transmit a standard television signal. Grandfathered ITFS stations on the eight E and F channels also lease excess capacity to wireless cable operators.

[12] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7482-88 (1994). The Commission is required to file such reports pursuant to the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 628(g), 106 Stat. 1460 (amending the Communications Act of 1934), codified at 47 U.S.C. § 548(g). The Commission recently adopted a *Notice of Inquiry* to obtain information needed to prepare the annual assessment that will be released in 1995, FCC 95-186 (released May 24, 1995), 60 Fed. Reg. 29,533 (June 5, 1995).

that have increased access to financing. According to the Wireless Cable Association International, Inc. (Association), "[t]he rapid growth of the wireless cable industry has been fueled by recent debt and equity financing that almost certainly would not have been made but for investor confidence engendered by the FCC's nurturing of wireless cable."[13] Moreover, the growth of MDS has led to the continued development of ITFS. Indeed, wireless cable operators significantly serve the public interest by supporting and funding approximately 95 percent of all new ITFS applicants. This includes many small, rural school systems who now have, or will soon have, access to quality educational materials, which historically have been available only to more affluent school systems. In addition to its contributions to ITFS, wireless cable operators offer other public interest benefits which include expanding consumer choice, stimulating economic growth and providing competition to other multichannel video programming distributors, resulting in better service to the public at lower prices. Today, the Association estimates that there are 170 wireless cable systems in operation which serve approximately 700,000 homes, and experts predict that wireless cable will at least double its current subscriber base by the end of 1995. Comments of Association at 6-7.

9. MDS is a heavily encumbered service. Most of the thirteen MDS channels have already been authorized in the largest metropolitan areas, especially for locations in the eastern half of the country. Thus far, MDS has developed almost entirely in large and medium-sized cities, though MDS systems also serve many smaller communities in the western states. In addition to the approximately 170 operating wireless cable systems, many conditional licenses have been issued to entities that, presumably, are in various stages of constructing their systems. Finally, the MDS landscape includes MDS systems proposed in applications now being processed at the Commission.

10. On December 1, 1994, the Commission released a *Notice of Proposed Rulemaking* in this proceeding which solicited comment on proposals that would modify our MDS filing procedures and use competitive bidding to select from among mutually exclusive applicants. *Notice of Proposed Rulemaking* in MM Docket No. 94-131 and PP Docket No. 93-253, 9 FCC Rcd 7665 (1994) (*Notice*). In the *Notice*, the Commission acknowledged that wireless cable operators must have access to as many available channels as possible in order to meet subscriber demand and compete with wired cable television systems in the same area. We further observed in the *Notice* that the expansion of the wireless cable industry has been stifled by an MDS licensing process that has been bogged down for a number of years by thousands of applications and legal protests. The majority of the applications were believed to be speculative and many of the protests were believed to be frivolous. *Notice* at 7668-69. In 1990, the Commission adopted a one-day cut-off period, which is referred to as the "same calendar day rule," in an attempt to limit the opportunity for speculators to simply

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[13] Comments of Association at 6. The Association members include the operators of virtually all wireless cable systems in the United States, as well as licensees in MDS and ITFS, equipment manufacturers and program suppliers.

copy applications that were previously filed and resubmit them under different names.[14] Nevertheless, speculators continued to file a large number of applications up to the time the Commission imposed the freeze on filing applications for new MDS stations in 1992.[15] The backlog has been significantly reduced since the freeze was imposed, and the staff is continuing its efforts to eliminate the remaining backlog of pending applications, process other applications filed after the freeze, such as modifications, and update the MDS inventory.[16] The proposals set forth for consideration in this proceeding were designed to avoid the future accumulation of backlogged applications and legal protests that have delayed the deployment of MDS stations in the past.

11. In the *Notice*, we proposed to modify our application filing procedures and use competitive bidding to select from among mutually exclusive applicants. We also proposed to implement a mandatory electronic filing system for new MDS and ITFS applications.[17] As a complement to the electronic procedures, the *Notice* proposed that the Commission utilize computerized interference studies, revise the current application forms, permit the electronic filing of fee payments and establish a current data base with on-line viewing access to the public. Finally, the *Notice* solicited any other proposals that would allow the Commission to process applications for new MDS stations more efficiently. We received twenty-two comments and nineteen replies from commenters who include MDS licensees, wireless cable operators, attorneys, consulting engineers, educational institutions and other entities who are

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[14] 47 C.F.R. § 21.914. *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410, 6424 (1990); *Order on Reconsideration*, 6 FCC Rcd 6764 (1991), *petition for review filed, United States Independent Microwave Television Association v. FCC and United States of America*, No. 91-1637 (D.C. Cir. filed Dec. 20, 1991) (held in abeyance by Court Order of February 21, 1992, pending action on second set of reconsideration petitions); *Second Order on Reconsideration*, FCC 95-231 (released June 21, 1995).

[15] *Supra* at n.3. In January of 1993, the Commission adopted a number of rule changes designed to deter abuse by speculators. *Report and Order* in PR Docket No. 92-80, 8 FCC Rcd 1444 (1993).

[16] *See, e.g., 101 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations*, 9 FCC Rcd 7886 (1994); *4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites*, 10 FCC Rcd 1335 (1994), *joint notice of appeal filed, A/B Financial, Inc., et al. v. FCC*, 95-1027 (D.C. Cir. filed Jan. 9, 1995). In several orders adopted today, we uphold the return of an additional 731 MDS applications as unacceptable for filing.

[17] The only aspect of the *Notice* which applied to ITFS was the electronic filing proposal. In a separate proceeding, the Commission recently adopted improvements to the ITFS licensing process, including a window filing procedure. *Report and Order, Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, MM Docket No. 93-24, 10 FCC Rcd 2907 (1995).

interested in MDS.[18] While the commenters generally support the Commission's efforts to streamline its processing procedures and expedite development of wireless cable services, they have varying proposals on how to accomplish these goals.

III. DISCUSSION

A. FILING PROCEDURES AND SERVICE RULES

12. ***Proposals.*** In the *Notice*, the Commission proposed that applicants file short-form applications for established geographic service areas to identify mutually exclusive applicants for competitive bidding purposes and that the successful bidders file long-form applications. *Notice* at 7669-71. The *Notice* suggested the use of predetermined geographic areas, such as Metropolitan Statistical Areas (MSA) and Rural Service Areas (RSA) or Areas of Dominant Influence (ADI).[19] This proposal envisioned that we would release a public notice announcing auctions by geographic area, specifying the filing period for short-form applications (FCC Form 175)[20] and the applicable bidding procedures. Mutually exclusive applicants would bid for all usable MDS channels in that area as a package and the auction winner would be permitted to file long-form applications for conditional licenses to operate stations anywhere throughout the service area provided the specific engineering design of their MDS stations meets the Commission's interference protection standards with respect to all authorized or previously proposed MDS and ITFS facilities. Long-form applications accepted for filing would be proposed for grant by a Commission public notice, announcing that the applications are accepted for filing and opening a thirty-day period for filing petitions to deny. *See* 47 U.S.C. § 309(b); 47 C.F.R. § 21.30. The *Notice* observed that these filing procedures would enable operators to amass MDS channels, would avoid the lengthy delay

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[18] A list of the parties filing comments and replies is provided in Appendix A. The list includes parties who, in response to a July 28, 1993 *Public Notice*, filed comments on ways the Commission could expedite the processing of MDS applications. We have considered those views and incorporated those materials in the public record of this proceeding.

[19] MSAs and RSAs are standard geographic areas used by the Commission for administrative convenience in licensing cellular radio systems. The Commission has also used MSAs since 1983 for making mutually exclusive determinations for MDS applications filed for the E or F channels under 47 C.F.R. § 21.901(d)(5). ADIs are standard geographic areas that were developed by Arbitron Ratings Company. Each county in the United States is placed within one of 209 ADIs, the lowest numbered ADI having the highest population.

[20] FCC Form 175 contains the applicant's name, the markets in which the applicant wishes to bid, the persons authorized to make or withdraw a bid, whether the applicant is qualified as a designated entity under 47 C.F.R. § 1.2110, certifications that the applicant is legally, technically, financially and otherwise qualified, and identification of all parties involved in agreements, or certification that no agreements exist, relating to the authorizations being auctioned or the bidding process.

associated with licensing stations site-by-site and therefore would allow operators to enhance their services more rapidly. The *Notice* asked commenters to determine which type of geographic areas would be most suitable for MDS and to address the definition of protected service area. In particular, we requested comment on whether the current definition of an MDS station's protected service area would be appropriate,[21] or whether the boundary of the geographic area designed for auction purposes should become the protected service area. We also asked commenters to discuss the interference standards for service to the areas adjacent to the boundaries between geographic areas. Although the *Notice* identified this approach of licensing MDS channels as the preferred approach, we also invited comment on alternative licensing procedures.

13. The *Notice* suggested an alternative approach that would limit applications to predetermined sites where there are vacant E, F or H channels. *Notice* at 7671-72. Under this approach, the Commission would identify such sites based upon the location of an already authorized E, F or H channel. The Commission would issue multiple public notices specifying the filing period and applicants would file a short-form application to identify mutually exclusive situations for purposes of competitive bidding. The auction winner would be required to file a long-form application containing a complete engineering proposal and specifying a compatible station design with the Commission's interference protection standards to all previously proposed or authorized MDS and ITFS facilities.

14. Under another alternative presented in the *Notice,* the Commission would periodically open national filing windows, with no geographic restrictions on filing for available MDS channels. *Notice* at 7672-73. Pursuant to this proposal, we would release a public notice announcing the filing window for available channels. This proposal would initially require a long-form application, containing the applicant's complete technical proposal, to determine mutual exclusivity before competitive bidding procedures are implemented. The *Notice* pointed out that this approach would likely result in a larger number of mutually exclusive applications and increase the possibility of "daisy-chains" (interlinking application proposals at different locations), which would require a more complicated and time consuming competitive bidding process, including subsequent rounds of auctions to resolve all mutual exclusivities in a daisy-chain. We invited commenters favoring a national window approach to recommend ways to resolve the daisy-chains that might arise under this proposal.

15. As an option to the national filing window approach, the *Notice* discussed limiting eligibility to file in the first window to existing licensees and system operators who, at the time the application is filed, are operating with a certain minimum number of channels. *Notice* at 7673. In many situations, the acquisition of a small number of

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[21] 47 C.F.R. § 21.902. In another order, also adopted today, the Commission amends 47 C.F.R. § 21.902, to expand the protected service area for authorized or previously proposed MDS facilities. *Second Order on Reconsideration* at ¶¶ 2-31.

additional channels may be essential for launching a whole new wireless cable system in a given area. This approach would allow existing wireless cable operators to accumulate the critical mass of channels necessary to operate competitive wireless cable systems. We asked commenters favoring this option to suggest eligibility requirements to govern the filing of applications in this first window.

16. ***Comments.*** There is no consensus in the comments as to which filing approach we should adopt for new MDS stations. The majority of the commenting parties express support for the national filing window approach. Of these, most favor a first window limited to existing licensees and operators, and some commenters advocate such a preference regardless of the filing approach. A few of the commenters support the *Notice's* preferred approach of filing applications for predetermined geographic areas; however, they disagree as to the appropriate type and size of service areas. The commenters who discussed the approach that would restrict applications to Commission-identified sites where there are vacant E, F or H channels available generally oppose that concept. Others suggest additional options, such as an MDS allotment plan, or variations of the alternatives proposed in the *Notice*, such as a national filing window coupled with short-form applications or a first window limited to existing operators with subsequent windows for remaining MDS channels licensed by MSAs and RSAs. Several parties provided additional suggestions for filing procedures, not discussed in the *Notice*.

17. Crowell & Moring, Pacific Telesis Enhanced Services (PacTel), the Rural Wireless Cable Coalition (Rural Wireless) and CAI Wireless Systems, Inc. (CAI Wireless) favor the *Notice's* preferred filing approach where the boundary of the geographic area becomes the protected service area.[22] They agree with the *Notice* that an approach based upon predetermined geographic areas provides the most efficient system for disseminating MDS licenses. In particular, Crowell & Moring prefers this approach over site-by-site licensing because geographic licensing is easier to administer, it achieves the most efficient use of the spectrum, it eliminates daisy-chains (interlinking application proposals at different locations), and it avoids burdensome litigation. Crowell & Moring believes that failure to adopt a geographic area licensing approach would leave MDS at a serious competitive disadvantage compared with Local Multipoint Distribution Service (LMDS) which proposes to license by BTAs and Interactive Video and Data Service (IVDS) which licenses by MSAs and RSAs. PacTel maintains that the licenses would be awarded to those who value them most, and the auction winner would be more likely to be a viable competitor to wired cable. Crowell & Moring and PacTel prefer using ADIs as the basis for MDS service areas because ADIs are of sufficient size to allow a large subscriber base, improving the value of

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[22] *See* Comments of Crowell & Moring at 2-10; PacTel at 2-3; CAI Wireless at 4-6; Rural Wireless at 9-10; Reply Comments of Crowell & Moring at 2-12; CAI Wireless at 8-12; Rural Wireless at 6-9. Rural Wireless includes Central Texas Wireless TV, Inc., Adams Telcom, Inc., Leaco Rural Telephone Cooperative, Inc., Delhi Telephone Company and Valley Telephone Cooperative, Inc.

advertising and allowing more effective competition with wired cable, and because there are more usable channels than available in MSAs and RSAs, ADI auctions would attract more bidders. Rural Wireless believes that MSAs would be attractive to larger companies and RSAs would be more affordable to small operators, such as rural telephone companies, encouraging participation by a variety of service providers. Rural Wireless recommends that the auction winner have the option to partition unused portions of the service area. Partitioning, according to Rural Wireless, would give rural telephone companies a meaningful opportunity to acquire MDS licenses, thereby introducing or improving wireless cable to rural areas, many of which have no other source of multichannel video programming. CAI Wireless supports using MSAs and RSAs for licensing only after a first window for existing operators and recommends that the protected service areas be made coterminous with the boundaries of the MSAs and RSAs only after digital compression technologies are introduced.[23] Finally, Crowell & Moring requests that the Commission modify its rules to allow the licensee of a geographic area to apply for unused ITFS frequencies anywhere within the protected service area.

18. Numerous commenters oppose geographic licensing where the protected service areas of the MDS stations are coterminous with the boundaries of the geographic areas. Essentially, they present five interrelated arguments in opposition to this approach. First, many commenters assert that such an approach places limits on an operator's flexibility to design a system. For example, American Telecasting, Inc. (American Telecasting) explains that wireless cable operators select their locations based on where they already have systems, the absence of cable service, the presence of poor cable service or other business reasons inconsistent with political boundaries. Comments of American Telecasting at 17. Second, a few commenters assert that the MDS analog technology, unlike cellular technology, does not permit a wireless cable system to provide service throughout a designated area without significant leakage into adjacent service areas. According to the Association, if a system is designed to maximize coverage of a given geographic area, it will leak significant signal levels into a neighboring area, and if a system reduces its signal to prevent leakage, the operator loses its flexibility to maximize population coverage. Comments of Association at 39-40. The Association points out that while it may be possible to design a wireless cable system without leakage into adjacent areas after conversion to digital technology, the most optimistic estimate for availability of digital compression equipment in quantity is the first quarter of 1996. Comments of Association at 3-4. Third, several commenters emphasize that the sizes of some areas are inappropriate for the MDS service and may cause delays in the introduction of service in many markets. For example, American Telecasting asserts that

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[23] Digital compression is a technology that employs various techniques to reduce the number of bits required to transmit a program. For a given channel bandwidth and digital transmission rate, an operator may, depending on circumstances, transmit a single uncompressed program or multiple compressed programs. For example, a six-to-one compression ratio permits the operator to offer six program channels over one 6 MHz channel that would accommodate only one uncompressed program.

area boundaries have nothing to do with wireless cable service areas, that ADIs tend to be much larger than wireless cable service areas, that MSAs can be larger or smaller than wireless cable service areas and that BTAs are an equally poor methodology. Comments of American Telecasting at 18. The Richard L. Vega Group (Vega) indicates that the irregular market boundaries of MSAs, RSAs, BTAs, MTAs and ADIs are unfit for MDS. Comments of Vega at 2-4. The Association asserts that if the Commission utilizes large geographic areas, such as ADIs, it must afford an opportunity for entities to enter into bidding consortia and partition the ADI among themselves. The Association further asserts that if channels are auctioned by geographic areas, the use of simultaneous multiple round bidding would allow applicants to bid for adjacent markets and design systems to maximize population coverage beyond boundaries. Comments of Association at 34-37. Fourth, several commenters believe that area-based licensing is inconsistent with the licensing of ITFS facilities.[24] Specifically, some contend that the protected service area for MDS and ITFS should be coterminous to ensure adequate protection for all of a wireless cable operator's channels. Other parties argue that a licensing system based on geographic areas would result in newly authorized systems that are different and most likely incompatible with previously authorized MDS facilities, making it difficult for incumbent operators to add channels to their systems. The Association is concerned about the level of protection incumbent licensees will have and their flexibility to upgrade their facilities in the future. Finally, many commenters believe that a licensing system based on geographic areas will attract speculative applications because of the simplicity of the short-form and because it is easier for unscrupulous marketers to sell an already defined market area. For example, Hardin and Associates, Inc. (Hardin) is concerned that applicants may be deceived into bidding on an area that appears to be profitable, only to discover after the auction that the area is worthless because of the harmful interference from existing stations. Comments of Hardin at 5.

19. Two commenters support the approach which would require the Commission to identify sites based upon the location of an already authorized E, F or H channel, but only as a second option. *See* Comments of Hardin at 7; Association at 45-47. For example, Hardin contends that this approach, when compared to the geographic licensing approach, is more likely to result in constructed stations that coexist with surrounding stations in an environment free of interference. Hardin and the Association, however, along with the many opponents of this approach, identify several problems with such an approach.[25] They contend that it limits the operator's flexibility to design a system, it falsely assumes that the

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[24] *See* Comments of Association at 41; Caritas Telecommunications (Caritas) at 2; Reply Comments of Humanities Instructional Television Educational Center, Inc. (Humanities) at 1; University of Arizona at 1; People's Choice TV Corp. at 2; Region IV Education Service Center (Region IV) at 1; University of Maryland at 1; American Telecasting at 20; National ITFS Association (National ITFS) at 3-4.

[25] *Id.; See also* Comments of CAI Wireless at 7-8; Dalager Engineering Company (Dalager) at 2; Marshall Communications, Inc. (Marshall) at 5; Vega at 6.

previously authorized E, F and H channels are going to be constructed where previously proposed, and it would require the Commission to make subjective choices between sites.

20. The commenting parties who support adoption of the national filing window approach assert similar arguments.[26] The Association, for example, states that the national filing window approach is best because it allows licensees to continue to self-select their protected service area through station location and design, and implementation of an electronic filing system will eliminate much of the delay associated with site-specific licensing. Marshall believes that a national window would result in better coverage for populated areas while minimizing harmful interference, as topography and demographics are considered when choosing a station location. Heartland believes that implementation of this approach would be much less disruptive to the wireless cable industry, stating that although it is a slower process, a whole new complicated licensing process would take longer. Hardin believes that a national filing window would generate applicants that are genuinely interested because a detailed engineering analysis is required prior to submitting a long-form application for competitive bidding. Dalager and ACS Enterprises, *et al.*, suggest that daisy-chains be resolved by multi-part auctions, determining the auction winner and dismissing any mutually exclusive applications and repeating the process with the remaining applicants. Opponents contend that the national window site-by-site licensing approach is administratively complex, increases the possibility of daisy-chains, encourages litigation and thus, would delay the development of new and improved wireless cable service. For example, Rural Wireless states that because this approach has no geographic restrictions, the Commission would be forced to expend an inordinate amount of resources to resolve daisy-chains and determine which mutually exclusive applicants should be placed in the same auction.

21. Of the commenters advocating adoption of the national filing window, a majority favor first window eligibility limited to existing MDS licensees and system operators, with several variations on the specific eligibility requirements. For example, the Association believes that the eligibility restriction should be based upon the number of channels necessary to succeed. Comments of Association at 25-33. Of those parties supporting the geographic licensing approach, three favor a similar preference as part of their licensing scheme. Most

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[26] *See, e.g.*, Comments of American Telecasting at 12-17; Dalager at 2; Hardin at 7-9; Heartland Wireless Communications, Inc. (Heartland) at 5-6; Marshall at 5-6; Mitchell Communications Corp. (Mitchell) at 2; National ITFS at 3-4; Vega at 7-9; Sioux Valley Rural Television, Inc. at 1-2; United States Wireless Cable, Inc. (U.S. Wireless) at 4; Vermont Wireless Cooperative (Vermont Wireless) at 1; Association at 41-44; ACS Enterprises, Inc., Baton Rouge Wireless Cable Television, CableMaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Reading Wireless Cable General Partnership, Shreveport Wireless Cable Television Partnership, Superchannels of Las Vegas, Inc., Wireless Holdings, Inc. and XYZ Microwave Systems, Inc. (ACS Enterprises, *et al.*) at 5-13; Reply Comments of Association at 19-23; Cross Country Wireless, Inc. (Cross Country) at 3; Multi-Micro, Inc. (Multi-Micro) at 2; Applied Video Technologies, Inc. at 2-3.

of the parties advocating first window eligibility are either MDS licensees or wireless cable operators. The Association and CAI Wireless believe that this approach will permit the Commission to devote scarce processing resources to those in the best position to immediately introduce competition into the marketplace. CAI Wireless emphasizes that limiting eligibility will deter speculative, fraudulent and anticompetitive applicants. Heartland, Vermont Wireless and Multi-Micro assert that existing operators have made substantial investments in the wireless cable industry, they built on the expectation of eventually acquiring additional channels and they deserve an opportunity to complete their systems to effectively compete with wired cable. American Telecasting argues that this type of preference would satisfy the Commission's goal to allow operators to enhance their service more rapidly and thus, accelerate competition to cable. In opposition, Dalager argues that such a preference is unfair to ineligible individuals who have waited patiently for the Commission to lift the freeze, and it is unnecessary because the channels in a specific area are worth more to the local operator than anyone else and the marketplace will place a value on them at auction. PacTel agrees that licenses should be awarded to those who value them most and giving licensees and operators a preference creates the potential for unjust enrichment due to the relatively small number of potential bidders. Vega argues that an initial window for incumbents discriminates against new entrants to the MDS industry.

22. A few of the commenting parties express their support for different filing proposals that were not raised in the *Notice*. du Treil, Lundin & Rackley, Inc. (du Treil) proposes that the Commission develop a comprehensive allotment plan for specific communities across the entire country, with a 50-mile separation and competitive bidding by market. Comments of du Treil at 1-4. Vega and ACS Enterprises, *et al.* propose a national filing window approach with short-form applications. Vega's proposal would use a 50-mile separation to identify mutually exclusive applications for competitive bidding purposes and would only require a certification on the short-form application indicating that the necessary interference studies were conducted and ACS Enterprises, *et al.*, would require technical information on its recommended short-form application, including the specific channels, proposed site coordinates, antenna height, polarization and power. Comments of Vega at 7-9; ACS Enterprises, *et al.* at 12-13. CAI Wireless proposes a first window limited to existing operators followed by windows for the remaining MDS channels licensed by MSA and RSA, permitting auction winners to file long-form applications to operate facilities anywhere in the service area and mutually exclusive applicants in the boundary areas that are unable to negotiate interference rights would participate in a second auction restricted to the channels in the boundary areas. Comments of CAI Wireless at 2-6.

23. Several commenting parties set forth other proposals to enhance processing efficiencies or otherwise improve service to the public. For instance, the definition for protected service area is an issue of vital importance to the industry and several of the commenters indicate that the current interference protection rule which protects an area within 15 miles of a transmitter site or more generally, 710 square miles, fails to adequately

protect existing service from MDS stations. *See* 47 C.F.R. § 21.902(d).[27] Some commenters also believe that an expanded protected service area would deter speculators. They specifically recommend adoption of an approach based on the service capabilities of each station, as proposed by the Association in its Petition for Partial Reconsideration in Gen. Docket No. 90-54 and reiterated in its Comments in this proceeding.[28] Other parties argue that the MDS and ITFS protected areas should be identical and a few others contend that there should be no change in the rule. U.S. Wireless believes that automatic forfeiture of a license under 47 C.F.R. § 21.44 should be eliminated because it subjects MDS conditional licensees and lessees to undue hardship. Reply Comments of U.S. Wireless at 3-4. Several parties urge the Commission to eliminate the application backlog and improve the accuracy of the data base before accepting any new applications, and others recommend additional safeguards against abuse of the Commission's processes including ways to deter speculators and prevent the warehousing of channels, such as the proposal by U.S. Wireless to adopt a finder's preference for reporting unconstructed channels.

24. ***Resolution:*** After careful consideration of the merits of the various proposals we raised in the *Notice*, we continue to prefer a filing approach where applicants file short-form applications and auction winners file long-form applications. We have decided that BTAs are the most appropriate geographic area for MDS. The boundaries of each geographic area, with the exceptions of channels obtained through leases with ITFS licensees, will become the protected service area for the auction winner. The auction winners will be issued authorizations for specific geographic areas and will be permitted to operate one or more MDS transmitting stations and signal boosters anywhere inside the service area, provided the specific engineering design meets the Commission's interference protection standards to all authorized or previously proposed MDS and ITFS facilities, and complies with the limits we establish for signal strength along the perimeter of the geographic area. *See infra* at ¶¶ 50-53. Following the auction, there would be a five year build-out period in which an authorization holder can expand service or initiate new service within their area without competing applications. The authorization holder will also be permitted to partition its area along established geopolitical boundaries and enter into contracts with eligible parties, allowing such parties to file long-form applications for usable MDS channels within that

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[27] This issue is being addressed in a separate order adopted by the Commission today. *Second Order on Reconsideration*, at ¶¶ 2-31. A number of commenters request that the Commission reduce the 120-day public notice period afforded ITFS licensees and permittees under 47 C.F.R. § 21.902(i)(6), to file petitions to deny MDS applications for new and modified stations. Hardin and Marshall suggest the Commission adopt a rule requiring the use of frequency offset transmitters to reduce cochannel interference. These issues are also addressed in the *Second Order on Reconsideration*, at ¶¶ 32-53.

[28] *Supra* at n.5; Comments of Association at 20-25. *See, e.g.*, Comments of American Telecasting at 23; Reply Comments of CAI Wireless at 2; Hardin at 2-3; Cross Country; Humanities; Multi-Micro; University of Arizona; Region IV; University of Maryland.

partitioned area. *See infra* at ¶¶ 46-47. This will permit broad participation from entities of all sizes. This framework provides the most efficient system of disseminating MDS licenses because service areas are easily identified and authorizations are promptly granted with minimal administrative or judicial delays. This approach will also provide operators sufficient flexibility to design systems that satisfy consumer demand.

25. We emphasize that there is no perfect or simple filing approach to adopt at this time for new MDS authorizations given the history of the service, the characteristics of the technologies involved, the implementation of competitive bidding procedures, and our goal to rapidly enhance wireless cable systems as viable competitors in the multichannel video marketplace. We also reiterate that MDS is a heavily encumbered service. Although conditional licenses in some markets for one or more channels have been forfeited for failure to comply with express conditions or to timely construct, in a majority of the markets only small portions are unserved and few channels are available. Of the thirteen MDS channels, it is possible that no channel remains available for prospective bidders for as many as 59 of the cities of the top 100 ranked television markets. There are possibly two or less channels available in as many as 90 percent of these market cities. Moreover, the fixed 35-mile protected service areas of MDS incumbents, adopted today in a separate proceeding, will occupy substantial portions of most BTAs and typically cross BTA boundaries, especially in the eastern half of the country where BTAs are relatively geographically smaller. By enabling incumbents to continue providing interference-free service to subscribers within the expanded 35-mile areas, it is likely that in a substantial number of BTAs, it may be difficult, if not impossible, for an auction winner to locate a station anywhere in the BTA to provide both interference-free service and the necessary interference protection to protected areas of incumbents; unless either the auction winner is the incumbent, negotiates an interference agreement with the incumbent or would acquire the authorization of the incumbent.[29] We emphasize that prospective bidders must carefully ascertain the extent of incumbent operations and authorized but unconstructed facilities in any BTAs prior to bidding. Further, where there remains outstanding at the time of auction a pending application, petition for reconsideration, reinstatement request or application for review affecting any BTA, winning bidders would acquire any authorization conditioned upon the outcome of Commission actions on such applications or pleadings. Prospective bidders must consider the total impact of incumbents in their valuation of the auction areas for competitive bidding purposes.

26. With regard to the definition of the service area to be authorized for MDS, we conclude that issuing authorizations by Basic Trading Areas (BTA) reflects the best balance of competing considerations. We considered several service area options including

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[29] In assessing MDS channel availability, we assumed that each authorized or previously proposed MDS station has a protected service area of 35 miles, *i.e.*, the expanded service area adopted today in a related order. *Second Order on Reconsideration.*

Metropolitan Statistical Areas (MSA) and Rural Service Areas (RSA),[30] the television Areas of Dominant Influence (ADI) and the analytically similar Designated Market Areas (DMA),[31] Basic Trading Areas (BTA) and a combination of service areas that vary in size. The record reflects that because many MSAs are much smaller than actual service areas existing today, wireless cable stations licensed to different entities in adjacent MSAs would have great difficulty providing service to their MSA without causing harmful interference to systems in adjacent areas.[32] In some cases, operators who designed their systems to maximize population, are serving subscribers located beyond the MSA in which the transmission facilities are located.[33] Furthermore, the record indicates that the use of MSAs and RSAs would result in unnecessary fragmentation of natural markets and in order to protect the boundaries of adjacent MSAs and RSAs, in many cases, stations would have to operate at extremely low levels of power. While simultaneous multiple round bidding would permit the consolidation of interdependent MSAs and RSAs, and licensees could acquire additional markets after auctions through the assignment and transfer process, we believe that these options may result in unproductive regulatory and transaction costs for the Commission and applicants. We believe that the use of larger service areas would alleviate these problems and would reduce the need for and cost of interference coordination between neighboring licensees.

27. ADIs and DMAs, on the other hand, tend to be much larger than the area in which reliable MDS service is available using today's technology. American Telecasting indicates that ADIs tend to be over seven times the size of actual wireless cable protected service areas (of 710 square miles) and therefore concludes that ADIs are the least appropriate service area for MDS. It explains that ADIs are designed for television advertising measurement purposes and unlike wireless cable, the signal of television stations and hence the size of ADIs are attributed to cable carriage of television signals. Comments of American Telecasting at 18. Furthermore, the cost of acquiring an ADI authorization through competitive bidding, building systems and marketing services in the larger ADIs may unnecessarily restrict entry to a small number of applicants. BTAs offer a compromise in

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[30] MSAs and RSAs are used by the Commission in licensing cellular radio systems. All of the 306 MSAs and 428 RSAs and the counties they comprise are listed in *Public Notice*, Report No. CL-92-40, "Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties," 7 FCC Rcd 742 (1992). *See also* 47 C.F.R. § 22.909.

[31] DMAs are standard geographic areas developed by A.C. Neilsen Company in which each county in the continental United States is placed within one of the 211 DMAs, the lowest numbered DMA having the highest population.

[32] *See, e.g.,* Comments of American Telecasting at 18; Marshall at 2-3; Vega at 2-4; Association at 35-37; ACS Enterprises, *et al.* at 6-9.

[33] For example, the Association described an existing wireless cable operator in Ohio who currently serves subscribers in three different MSAs. Comments of Association at 37.

size that may best approximate MDS service areas. Although varying in geographic shape and size, BTAs are bigger than MSAs generally since they often include the MSA and surrounding counties, thus mitigating harmful interference among adjacent areas. BTAs offer sufficiently large service areas to allow applicants flexibility in designing a system to maximize population coverage and take advantage of economies of scale necessary to support a successful operation. Yet BTAs are generally smaller than ADIs, making the initial cost of acquiring the authorization through competitive bidding lower, and therefore providing greater opportunity for participation by small businesses, female and minority entrepreneurs and rural telephone companies. The use of BTAs combined with geographic partitioning will encourage further participation by a wide variety of applicants. *See* 47 U.S.C. § 307(j)(4(C). Finally, BTAs provide a manageable number of discrete filing areas for competitive bidding purposes.

28. We recognize that the majority of the commenting parties express support for the national filing window approach. We believe, however, that using national filing windows would most likely result in more of the very substantial processing and administrative delays that have long plagued the development of the wireless cable service. Given the history of the service, we believe such delays are inherent in site-specific licensing, which would require analysis of long-form applications containing the applicant's complete engineering proposal before the competitive bidding process begins. Since the national filing window approach would likely result in a larger number of mutually exclusive applications and daisy-chains, implementation would likely require significant Commission resources and a substantial amount of time to conduct the multi-part auctions (to resolve the daisy-chains) recommended by some commenters or otherwise complete the competitive bidding process. We acknowledge the concerns of some commenters that the licensing approach should afford MDS licensees flexibility to locate systems wherever necessary to maximize coverage. The record reflects that the success of the wireless cable industry thus far has been based upon negotiated agreements with neighboring system operators and strong partnerships with ITFS licensees. The filing system and procedures we adopt herein are expected to facilitate such negotiations and afford wireless cable operators the flexibility to improve existing systems, introduce new systems and implement digital technologies.

29. Indeed, the record indicates that geographic licensing may be the most efficient method to these ends in a digital environment, toward which the wireless cable industry is moving.[34] The nature of digital transmissions will allow more flexibility to tailor signal coverage to geographic boundaries using multiple transmitting facilities. We believe that our rules will facilitate the transition to digital transmissions. If modification of our rules become necessary, we will act promptly to ensure that our rules in no way impede the digital future.

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[34] *See* Comments of CAI Wireless at 5; Association at 3-4; Reply Comments of CAI Wireless at 11; Crowell & Moring at 8.

30. In response to the concern about the protected service areas for MDS (BTAs) and ITFS being different, we must emphasize that the two services have differing purposes and authorization procedures. One is intended primarily to provide educational and cultural development to students enrolled in accredited schools and the authorization is issued to the best qualified applicant, while the other is commercial in nature and is subject to competitive bidding. Furthermore, unlike MDS stations, the protection afforded to ITFS operators is based upon receive sites and protected service area is defined in 47 C.F.R. § 74.903. Pursuant to this rule, the protected service area associated with the leasing of excess channel capacity will also expand to a circle, 35 miles in radius, centered about the transmitter site of the ITFS station. We note, however, that in a recent proceeding we adopted a 35-mile protection distance for ITFS receivers, a protection distance that is compatible with many BTAs,[35] and with the 35-mile protected service area for MDS stations which are authorized or previously proposed that we have separately adopted today. *Second Order on Reconsideration.*

31. For the reasons stated above, we believe that licensing by geographic areas is the best approach for issuing MDS authorizations. We decide not to adopt the approach presented in the *Notice* limiting applications to predetermined sites identified by the Commission based upon the locations of already authorized E, F or H channels where there are usable channels. We agree with the commenters that this approach is inflexible. An approach in which the Commission identifies the specific site sacrifices the business judgment of the operators when they are in the best position to consider market forces. Further, where there is more than one site, the Commission would have to establish criteria for choosing among the available locations. In addition, where identified sites are unavailable to the highest bidders, the Commission would have to process modification applications, which would actually decrease overall processing efficiency and would delay service to the public.

32. We decline to adopt a preference for existing licensees and system operators because we believe that, rather than place restrictions on eligibility to participate based upon an applicant having access to a minimum number of channels, it is in the public interest to encourage participation from a wide variety of applicants. Indeed, a new entrant into the wireless cable industry may place a higher value on the spectrum than an incumbent licensee or system operator in a given area. While we recognize that in some areas, the existing licensee or operator may be in the best position to immediately introduce competition to wired cable, we further believe that a new entrant with sufficient resources will be able to accumulate a sufficient critical mass of channels to launch a system in a market through the competitive bidding process and through the assignment or transfer of previously authorized channels. Thus, market forces will lead to the accumulation of channels into one operating system.

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[35] *Report and Order* in MM Docket No. 93-24, 10 FCC Rcd 2907, 2917.

33. We also decline to adopt the proposals set forth by du Treil, Vega, ACS Enterprises, *et al.* and CAI Wireless. The allotment scheme proposed by du Treil is inappropriate for MDS at this point in time because it is a heavily encumbered service. In addition, adoption of an allotment proposal would restrict engineering design flexibility. The proposals by Vega and ACS Enterprises, *et al.* to adopt the national filing window with short-form applications do not alleviate the delays caused by the likely large number of mutually exclusive applications forming daisy-chains. The request by U.S. Wireless to eliminate the automatic forfeiture rule is beyond the scope of this proceeding. A number of additional proposals were set forth by other commenting parties to otherwise improve the MDS filing process or prevent the warehousing of MDS channels, assuming a filing window approach was utilized. Essentially, the proposals are unnecessary in light of the modifications to our rules adopted in this proceeding and in the *Second Order on Reconsideration*.

1. Service Areas

34. We therefore will award MDS authorizations for entire BTA service areas under competitive bidding procedures. BTAs were designed by Rand McNally to represent the natural flow of commerce, comprising areas within which consumers have a community of interest. Like the other types of predetermined geographical areas, BTAs vary in size and shape. Typically, a BTA includes a population center(s) (city or large town) and the surrounding rural area. BTA boundaries are based on county lines because most statistical information relevant to marketing is published in terms of counties. The specific boundaries were drawn after a study of several factors, such as physiography, population distribution, economic activities, newspaper distribution and transportation facilities.[36]

35. We note that Rand McNally & Company is the copyright owner of the Basic Trading Area and Major Trading Area Listings, which list the counties contained in each BTA, as embodied in Rand McNally's Trading Area System Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide*. Rand McNally has licensed the use of its copyrighted MTA/BTA listings and maps for certain services such as Personal Communications Services (PCS), 800 MHz Specialized Mobile Radio Services (SMR) and Local Multipoint Distribution Services (LMDS). Rand McNally had also reached an agreement in principle with the American Mobile Telecommunications Association (AMTA) for a blanket copyright license for the conditional use of the copyrighted material in the 900 MHz SMR service. These agreements authorize the conditional use of Rand McNally's copyrighted material in connection with these particular services, require interested persons using the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership, and provide for a payment of a license fee to Rand McNally.

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[36] *See* Rand McNally *1992 Commercial Atlas & Marketing Guide* at 39.

36. Currently, MDS is not covered by any blanket copyright license agreement. While current and prospective MDS licensees and other parties interested in using the copyrighted materials may negotiate their own licensing arrangement with Rand McNally, as in other services, we encourage interested parties and Rand McNally to explore the possibility of entering into blanket license agreements similar to those noted above to cover MDS. In any event, we note further that an MDS BTA authorization grantee who does not obtain a copyright license (either through a blanket license agreement or some other arrangement) from Rand McNally for use of the copyrighted material may not rely on grant of a BTA-based authorization from the Commission as a defense to any claim of copyright infringement brought by Rand McNally against such grantee. The MTA/BTA Listings, the MTA/BTA Map and the license agreements noted above are available for public inspection at the MDS public reference room, Room 207, 2033 M Street, N.W, Washington, D.C.

37. The Commission will consider awarding the 487 BTA authorizations in the United States, with the following additions to be authorized as BTA-like areas: American Samoa, Guam, Northern Mariana Islands, San Juan, Puerto Rico, Mayaguez/Aguadilla-Ponce, Puerto Rico, and the United States Virgin Islands. Thus, a total of 493 authorizations will encompass all land areas within the United States and related territory. We reiterate that, based on its geographic size, and the extent of encumbrances, it may not be possible in a particular BTA to design and select a station site for any MDS station without negotiating an agreement with one or more affected previously authorized or proposed, cochannel or adjacent channel MDS or ITFS stations. However, we are going to hold auctions initially for all BTAs for which mutually exclusive, short-form applications are filed. The Commission will announce the time and place of the auction and the applicable bidding procedures by a future public notice. Applicants wishing to participate in the auction process will file a short-form application indicating each BTA service area for which they desire to bid. To determine eligibility to apply for a BTA service area, we will apply the same general eligibility requirements for an MDS authorization.[37] There is no restriction on the number of BTA service areas for which any entity may apply or on the number of BTA authorizations awarded to one entity. Incumbent MDS licensees, conditional licensees and applicants and new entrants will be eligible. Accordingly, prospective bidders will be able to aggregate adjacent BTAs to utilize economies of scale that currently benefit wired cable competitors. Selection from among the mutually exclusive applicants will be determined through a simultaneous multiple round bidding process. The auction winner for each BTA service area, if qualified, will be awarded a BTA authorization. The protected service area lies within the geographic boundary of that BTA, except as excluded by any 35-mile circle protected service areas of previously authorized or proposed MDS stations and except for channels related to ITFS lease agreements.

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[37] *See* 47 C.F.R. §§ 21.4, 21.17, 21.900, 21.912. Because we are amending our rules to implement competitive bidding, our rules regarding random selection and comparative consideration would not apply to applications for new stations filed after the lifting of the freeze. *See* 47 C.F.R. §§ 21.31, 21.914.

2. Rights and Responsibilities of BTA Authorization Holder

38. The following paragraphs describe the service rules regarding the rights and responsibilities of the holder of a BTA authorization, the duration of those rights and how an event will alter the boundaries of a protected MDS service area. For purposes of clarity, the chronology of the events would occur as follows: (1) the 35-mile protected service areas of incumbents will become fixed in place upon the effective date of the *Second Order on Reconsideration*; (2) issuance of public notices announcing auctions by geographic area, and specifying the filing periods for short-form applications and upfront payments; (3) issuance of a public notice identifying all applicants determined to be qualified to bid (*i.e.*, submitted acceptable short-form applications and sufficient upfront payments); (4) competitive bidding rounds; (5) after bidding has ended, the Commission would declare bidding closed and would notify the auction winners, who would then have five business days to make down payments and thirty business days to file at least one long-form application;[38] (6) following review of the long-form applications, the Commission would issue a public notice identifying those accepted and opening a thirty-day period for filing petitions to deny; and (7) if no petitions to deny are filed or if they are dismissed or denied, the Commission would issue a public notice stating that the BTA authorization and the MDS station license are ready to be issued. Assuming that the auction winner made full payment of its winning bid within five business days of this public notice, the Commission would grant one or more conditional station licenses for individual stations within the auction winner's BTA service area and issue the BTA authorization for the entire BTA service area.

a. Description of Authorization

39. The holder of a BTA authorization may file one or more long-form applications seeking authority to construct stations anywhere inside their BTA on usable MDS channels, provided the specific engineering design meets the Commission's interference protection standards to all authorized or previously proposed MDS and ITFS facilities, and complies with the prescribed signal strength limits at the BTA boundary, *i.e.*, at all points along the perimeter of the BTA. A separate conditional station license will be awarded for each single channel or channel group at each site location.[39] For example, separate licenses will be

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[38] If the BTA is so heavily encumbered that the winning bidder is unable to file a long-form application for a station within the BTA while protecting incumbents from harmful interference, the winning bidder must file a statement of intention of use of the BTA, accompanied by a current License Qualification Report (FCC Form 430), before the Commission issues the BTA authorization. *See infra* at ¶¶ 152-154.

[39] This in no way should be interpreted to reflect on other services where we are eliminating site licensing. *See Further Notice of Proposed Rule Making* in PR Docket No. 93-144 and PP Docket No. 93-253, FCC 94-271 (released Nov. 4, 1994), 59 Fed. Reg.

issued for the E Group, F Group and each of the three H Channels. In this *Report and Order*, the initial license for the BTA service area will be referred to as a "BTA authorization" and individual channels will be separately licensed. Thus, we will distinguish between three different types of authorizations for MDS facilities: (1) a "BTA authorization" awarded to an auction winner of a particular BTA following the requisite long-form application or statement of intention and requisite payment, (2) a "station license for each individual station within the BTA" service area held by an auction winner, and (3) a "station license" for an MDS facility authorized or previously proposed under the rules predating the effective date of this *Report and Order*. Accordingly, under the Commission's rules, as amended herein, the holder of a BTA authorization would file a long-form application for each usable single channel or channel group at each transmitter site within the auction winner's BTA service area, and will have a later opportunity to file amendments to correct any defects in the application. The construction period specified in each conditional station license granted for the individual stations within the auction winner's BTA service area will be the five year build-out date which runs from the grant date of the first conditional license within the auction winner's BTA (granted the same date as the BTA authorization). When the portion of the system represented by a particular long-form application is constructed and ready to begin operation, the holder of the BTA authorization will file a corresponding certification of completion of construction. The license term for those stations will be the same ten-year term as MDS stations licensed prior to the adoption of this *Report and Order*. *See* 47 C.F.R. § 21.45. The ten-year term for the new licenses will commence on the date the Commission declares bidding in the MDS auction to be closed. The holder of a BTA authorization has a protected service area that is coterminous with the boundaries of their BTA service area, subject to exclusion of the protected service areas and/or locations of authorized or previously proposed MDS and ITFS facilities, as further discussed *infra* in ¶ 54. Individual station licenses that are a part of a BTA service area will not have a uniquely associated protected service area. The common protected service area of all individual stations within the BTA authorization will be the boundary of that BTA.

40. We emphasize that the actual service areas can be tailored through voluntary agreements among the affected parties. Although our rules indicate that the holders of BTA authorizations must locate all transmitter sites within the boundaries of the BTA and may not cause interference in adjacent BTAs, the interference rights may be modified through negotiation and written agreement. The MDS station facilities within the auction winner's BTA may be expanded or modified throughout the BTA service area so long as the system continues to be in compliance with our technical rules and protects incumbent MDS and ITFS facilities. The facilities may be expanded beyond the BTA or into the protected service area of an incumbent with an agreement from the entity that controls the adjacent BTA or the incumbent protected 35-mile circular area.

60,111 (Nov. 22, 1994); *Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995), 60 Fed. Reg. 21,987 (May 4, 1995).

41. Consistent with our goal of establishing filing procedures and policies that will encourage the accumulation of a full complement of channels necessary for a viable MDS system, only the BTA authorization holder will be qualified to submit any new application for MDS use of available ITFS frequencies within the BTA in accordance with 47 C.F.R. § 74.990(a), and the ITFS application procedures of § 74.991. ITFS station licensees and prospective ITFS applicants that seek to construct and operate new ITFS facilities located within a BTA and that choose to lease excess channel capacity will be free to negotiate with any potential lessee, including the holder of the BTA. In furtherance of our goal of accumulating a full complement of channels, however, the holder of the BTA will be afforded the right to match the final offer of any proposed lessee. Should the holder of the BTA decline to exercise such right, then the ITFS applicant can enter into a lease arrangement with any operator it so chooses. This is not intended to interfere with present contractual rights that are in effect or renewal of those rights. In the case where a BTA authorization holder is the licensee of ITFS channels, the associated protected service area will be the entire BTA, and interference protection will be governed in the manner for protecting BTA service on MDS channels. However, in the case where a BTA authorization holder leases excess channel capacity from an ITFS licensee, the protected area will be a 35-mile circle centered around the particular ITFS station in the BTA that leases the channels. We will afford this area the same protection generally afforded under our ITFS rules. BTA authorization holders in adjacent BTAs must protect points on the 35-mile circle using cochannel and adjacent channel desired-to-undesired signal strength ratios of 45 dB and 0 dB, respectively. A special case will occur whenever BTA authorization holders in adjacent BTAs both lease the same ITFS channel group, such that the 35-mile protected circle of each extends into the BTA of the other. In this regard, we will expect the respective ITFS entities and BTA holders to reach an agreement concerning interference protection near their common boundary. Moreover, a BTA authorization holder will not be required to protect that portion of the 35-mile circle associated with the other authorization holder that falls on his or her side of the boundary. We believe that this approach will promote our policy objectives for this service and will similarly have only a positive effect on the continued successful development of ITFS with the ever expanding financial support for that service provided by wireless cable operators.

42. The available MDS spectrum within a BTA authorization will increase if the unconstructed facilities or unused channels held by an MDS incumbent with transmitter site locations within a particular BTA are forfeited or if previously proposed conditional licenses or modifications are not granted. The holders of the BTA authorizations obtain contingent rights to this spectrum when they receive their authorizations, so that the forfeited channels will revert and become part of the BTA authorization up to the boundary of the BTA. The holder of the BTA authorization may subsequently file long-form applications for the forfeited channels, provided the specific station design meets the Commission's interference protection standards. Such a policy provides an incentive for the holders of BTA authorizations to find and document such warehousing violations, resulting in efficient use of fallow spectrum. In addition, authorization rights may be revoked or terminated because of gross misconduct, misrepresentation or bad faith by an applicant. Other events may also

change the protected service area, such as the end of the five year build-out period, an assignment or transfer or partitioning of the BTA. These events are discussed in detail below.

b. Five Year Build-out Period

43. The build-out period in which the holder of a BTA authorization is permitted to expand service or initiate new service within their BTA service area will be five years. Specifically, we will provide the BTA authorization holder five years from the grant date of the initial BTA authorization to construct and operate the system. The purpose of this requirement is to ensure that service is promptly delivered to the public. *See* 47 U.S.C. § 309(j)(4)(B). This five year build-out period is not extended by the grant of subsequent authorizations, such as the grant of a long-form or modification application for an individual station within the BTA service area. We will require the holder of a BTA authorization to submit a showing to the Commission five years after the BTA authorization was issued demonstrating that it is providing a signal level sufficient to provide adequate service to approximately two-thirds of the population of the area within its control in the licensed BTA. The holder of the BTA authorization must submit maps and other supporting documents showing compliance with this construction requirement. The Commission, in evaluating the showing, may consider line-of-sight obstructions and the ability to provide service without causing harmful interference to other MDS or ITFS facilities. If the holder of the BTA fails to cover any of the BTA, it will forfeit the authorization and it will be ineligible to regain it. If the Commission determines that there are usable channels in an unserved or underserved area of the BTA, the Commission would partition the area along geopolitical boundaries and issue a public notice establishing the reauction of the partitioned area. This public notice would announce the auction or auctions by geographic area, specifying the filing period for short-form applications and the applicable bidding procedures. The holder of the BTA will forfeit the partitioned service area and will be ineligible to bid on it. We believe that this coverage policy is reasonable and will result in the channels being made available to applicants who will provide service to the public. We further believe that this will deter the warehousing of channels and ensure that the spectrum is being effectively utilized for MDS.

c. Assignment or Transfer of Control

44. The holders of BTA authorizations and MDS incumbents may negotiate mergers, buyouts, channel swaps, channel splits or make similar arrangements on a voluntary basis, pursuant to the general assignment and transfer provisions of 47 C.F.R. § 21.38. Both parties are generally permitted to buy from and sell authorizations to each other and to third parties, with few limitations.

45. Additional spectrum may be acquired by the holder of a BTA authorization through buyouts of incumbent licensees within their authorized BTA service area. As is the case with ITFS licensees, wireless cable operators may also acquire spectrum through leasing agreements with incumbents. In this case, the protected service area of the acquired station

will extend to the BTA boundary or the existing 35-mile protected circular area (from the incumbent), whichever is larger. The holder of the BTA authorization may assign or transfer control of its entire BTA, which will include all authorized stations, subject to the unjust enrichment provisions for designated entities. *See infra* at ¶¶ 183, 189. Such an assignment or transfer of an entire BTA may also include unserved areas so long as the five year build-out period has not expired. If a BTA authorization is assigned or transferred, the new holder of the BTA authorization is held to the original build-out period. The holder of the BTA authorization may also partition portions of the BTA along geopolitical boundaries under our partitioning rules, discussed below, and contract with eligible parties, allowing such parties to file long-form applications for the usable MDS channels within that area. We believe that allowing the partitioning of portions of the BTA service area will encourage provision of service to rural areas, which will promote the most efficient use of the spectrum. *See* 47 U.S.C. § 309(j)(3)(A) (instructing the Commission to promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas).

d. Partitioning

46. During the five year build-out period, we will permit the holder of a BTA authorization to partition portions of its BTA authorization and enter into contracts with eligible parties, allowing such parties to file long-form applications for the usable MDS channels within that partitioned area. The BTA may be partitioned along geopolitical boundaries, and the Commission may grant such applications, provided they are in compliance with the rules. Also, a holder of a BTA authorization will be permitted to add to its service area by acquiring a partitioned service area from the holder of an adjacent BTA. Following grant of such an application, the authorization will be referred to as "partitioned service area." The holder of a partitioned service area would, in effect, then hold something similar to a BTA authorization for the partitioned area. The protected service area will become or expand to the boundaries partitioned along the designated geopolitical boundaries and the same technical rules will apply, including the limiting signal strength at the boundaries of the partitioned area. Accordingly, the construction period for the partitioned service area will be the remaining portion of the five year build-out period and at the end of this five year period, the holder of the partitioned service area must demonstrate that it is providing substantial service to the partitioned area. Once construction is complete, the license term will run ten years from the date the Commission declared bidding in the MDS auction to be closed.

47. We agree with Rural Wireless that allowing holders of the BTA authorizations to partition will facilitate the provision of service to small markets and rural areas, some which currently have no source of multichannel video programming.[40] Partitioning will also

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[40] Comments of Rural Wireless at 10; *See also* Reply Comments of Rural Wireless at 8; National Telephone Cooperative Association (Telephone Cooperative) at 3.

promote the most efficient use of the spectrum and encourage participation by a wide variety of entities, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. *See* 47 U.S.C. §§ 309(j)(3)(B), (3)(D) and (4)(C).

e. Technical Rights and Responsibilities

48. In determining interference protection standards and other technical provisions under this new approach to MDS authorization of service, our objectives are two-fold: (1) to provide maximum flexibility to allow both new BTA authorization holders and current MDS licensees, conditional licensees, and applicants to develop and expand service in the most rapid and economically feasible manner, and (2) to assure that the introduction of new MDS service will not result in objectionable interference to the services of incumbent stations and will minimize in so far as possible the extent of potential interference within BTA service areas. These objectives and the provisions herein take into account the extent to which the current service has been built around successful negotiations among neighboring operators and/or licensees, as well as prospective operators and licensees. We fully expect this spirit of cooperation and accommodation to continue and, while we will adopt interference protection provisions for BTA and incumbent service, we will allow and indeed encourage the holders of BTA authorizations and incumbents to work out mutually agreeable interference concerns with other potentially affected parties whenever possible.

49. As a result of this *Report and Order* and a separate MDS order we are adopting today, protected service areas for BTA authorization holders and MDS incumbents will be defined differently. *Second Order on Reconsideration* at ¶¶ 2-31. We believe this approach will best facilitate the full development of incumbent wireless cable systems, many of which already have secured the desired transmitting site, and serve subscribers within a metropolitan area from a single site. In addition, this approach may allow the rapid expansion of new MDS service into other unserved portions of BTAs. We adopt an idea contemplated in the *Notice*, that the perimeter of a predetermined geographic area (BTA) generally defines its protected area. The holders of BTA authorizations will not be permitted to cause interference within the boundaries of an adjacent BTA, without the consent of the affected authorization holder. When such interference occurs, an offending party will be expected to act promptly to eliminate any unwanted interference in another operator's BTA.

50. Interference among adjacent BTA operators will be partially controlled by establishing an allowable limit for a station's predicted signal strength at all points along a BTA boundary. The same limiting signal strength will apply at the boundaries of every BTA, regardless of its size or shape. An exception to this limit would be justified where a single entity obtains authorization for adjacent BTAs. While we recognize that several commenting parties are concerned that an MDS signal simply does not stop at the area boundary, we believe the level of limiting signal strength given below, together with the multitude of available interference abatement techniques, will facilitate control of interference between BTA authorization holders in adjoining BTAs. Interference levels to BTA holders from MDS incumbent stations will be partially governed by establishing the same maximum

allowable signal strength along the boundary of incumbents' 35-mile circular areas, the expanded area provided in the *Second Order on Reconsideration*.

51. At first glance, it would appear that the approach to interference control between adjacent BTAs would be ineffective, given that the levels of desired (D) and undesired (U) could be the same at the common boundary between BTAs. The resulting desired-to-undesired signal strength ratio (D/U) of 0 dB falls well below the 45 dB standard now governing interference between MDS stations operating on the same channel. However, taking the signal suppressing affects of receiving antennas into account and further assuming that the desired and undesired signals are coming from opposite sides of the BTA boundary, the D/U ratio improves to as much as 25 dB. If we further expect that in most cases, stations on opposite sides of the boundary would operate with different antenna polarizations, then the D/U ratio further improves to 45 dB. These numbers are based on the characteristics of the standard MDS receiving antenna found in 47 C.F.R. § 21.902(f). Alternatively, station operators on opposite sides of a BTA boundary may design their facilities with agreements between affected parties to operate on a frequency offset basis, with a less restrictive D/U ratio of 28 dB necessary to prevent cochannel interference in this situation. Indeed, a host of interference abatement techniques could be employed to prevent interference near BTA boundaries. Admittedly, this approach relies more on operator interference agreements and the honoring of another's interference rights than it does on applying rigid interference standards in the processing of applications. However, if we were to mandate strict compliance with the 45 dB cochannel and 0 dB adjacent channel D/U signal strength ratios (the current MDS interference standards) to protect BTA service at the BTA boundary, we believe there would be populated areas within a substantial number of BTAs that may never be served due to the irregular sizes and shapes of BTAs. Moreover, as we have indicated, given the nature and history of the service, as well as the likelihood that auction participants will be experienced in conducting negotiations, we believe that we can prevent unwanted interference by relying primarily on negotiated agreements and voluntary compliance with our interference right-of-ways, which we will enforce as necessary. Thus, we consider our limitation of signal strength at the BTA boundaries and incumbent service areas as a secondary means of interference protection.

52. Inasmuch as incumbent stations lie within BTAs and authorized BTA stations will not have their own protected service areas, interference from incumbent stations can only be governed by agreements between affected parties, and indirectly, by placing a limiting value on the strength of the signal at the boundary of incumbent MDS stations. A signal strength, regardless of its numerical value, will not by itself eliminate the potential for interference from incumbent stations. Terrain shielding, and other abatement techniques will also be helpful in this regard; however, the most effective means of controlling interference will be the agreements between BTA authorization holders and incumbent MDS licensees, which for example, may stipulate that an incumbent utilize a directional antenna pointed away from the affected BTA.

53. We have selected as the limiting signal strength a power flux density value of - 73 dBw/m^2. This value corresponds to a received power level of approximately - 83 dBw (decibels above 1 watt) or - 53 dBm (decibels above 1 milliwatt), given a receiver antenna with a maximum gain of 20 dBi. A power flux density value is used because "free space" propagation is the model long used in the MDS service. This variable depends only on the level of power radiated from a transmitting antenna and the distance between the transmitting and receiving locations. The value of - 73 dBw/m^2 was selected because it is the "free space" value of power flux density achieved with an equivalent isotropically radiated power (EIRP) of 2,000 watts (the maximum allowable EIRP in the MDS service where omni-directional antennas are used) at a distance separation of 35 miles. This numerical value is stronger than the power flux density achieved under standards used in the MDS service for many years, *i.e.*, a value of - 75.6 dBw/m^2 is achieved with 200 watts of EIRP at a distance of 15 miles. Moreover, based on the record in the *Second Order on Reconsideration*, it is clear that many wireless cable systems serve a substantial subscriber base at distances of 35 miles or even greater. Thus, we conclude that the selection of this value of limiting signal strength will generally enable service over unobstructed signal propagation paths at the 35-mile boundary of an incumbent's transmitting facilities. The ability to achieve this signal level at a BTA boundary will vary considerably, depending on the size of the BTA and the placement of a transmitting facility. Clearly, because of their large size, service of many BTAs will require multiple transmitting facilities.

54. In the *Notice* we stated our intention not to change the interference protection standards applied "at points along the service contours of protected facilities." *Notice* at 7674. Accordingly, BTA authorization holders will be required to design their transmitting facilities to protect points along the 35-mile circles and points within the protected service areas of incumbents' licensed stations, conditionally licensed stations, or previously proposed applications. Specifically, stations proposed in BTA long-form applications must meet the 45 dB and 0 dB cochannel and adjacent channel desired-to-undesired signal strength ratios at the boundary of each protected 35-mile circle. We will also continue to use these stricter protection standards within incumbents' protected service areas. Unlike BTA service, which does not yet exist, incumbent stations have an established subscriber base in many cities and rural areas throughout the country. Wireless cable systems were carefully crafted, both through engineering design, site location and negotiation among affected parties, and in partial reliance on the Commission's protection standards. To a considerable extent, these systems provide interference-free reception to subscribers, many out to distances beyond 35 miles. Because many wireless cable systems have been serving subscribers well beyond their current 710 square mile protected service area, we do not wish to disrupt existing service patterns which compete with wired cable systems.

55. The holders of BTA authorizations within 80 kilometers (50 miles) of the Canadian or Mexican borders, may only operate on MDS channels pursuant to the restrictions in international agreements. Thus, applicants considering authorizations for these BTAs should consider the impact of the additional border requirements in their valuation of the service areas for competitive bidding purposes.

3. Treatment of Incumbents

56. As we have stated, a principal objective in this proceeding is to allow incumbents to continue existing operations without objectionable interference from new MDS operations and to allow them sufficient flexibility to modify their facilities to respond to market forces. Expansion of the protected service boundary to 35 miles will increase an incumbents' service area from 710 square miles to 3848 square miles, which will allow for the future orderly development of wireless cable systems, particularly as digital technology is introduced. *Second Order on Reconsideration* at ¶¶ 2-31.

57. Incumbents, unless they also control the adjacent BTA territory (either as BTA authorization holders or through interference agreements) will not be free to expand further their service area into the adjacent BTA. The manner we choose to prevent such occurrences is to define a limiting power flux density of - 73 dBw/m^2, which may not be exceeded at points along the 35-mile protected service area. Subject only to this limitation, incumbents will be free to file long-form applications at any time to modify their facilities or add facilities such as signal boosters. In a small number of cases involving directional antennas, an incumbent's power flux density may already exceed - 73 dBw/m^2, for signal paths in some directions at a distance of 35 miles. In such cases, we would not force the incumbent to reduce the signal strength to the allowable limit, nor would we allow the signal level to increase. Incumbents who propose to modify their stations must continue to seek prior Commission approval pursuant to 47 C.F.R. §§ 21.40 through 21.42, and include any agreements with the holder(s) of a BTA authorization(s). All other current rules continue to apply to MDS incumbents unless specifically amended.

58. Finally, since the incumbents' 35-mile protected circles will be embedded within one or more BTAs, to prevent additional encroachment into a BTA we must at some point fix the 35-mile circles around a permanent reference point, absent an interference agreement with a BTA authorization holder. Accordingly, on the effective date of the rules adopted in the *Second Order on Reconsideration,* we will permanently fix the location of the protected 35-mile circles in the following manner. For incumbent licensees with no conditional licenses or pending applications, the "protected reference coordinates" will be those of the current site. Subsequent changes in site location would be permitted; however, the 35-mile circle would remain centered about the previous site coordinates. For incumbents having only a conditional license or a new station application pending before the effective date, the site coordinates specified for the conditional license or pending application will become the reference coordinates. In cases where an incumbent has two or more authorizations and/or pending applications on the effective date, the reference coordinates in each authorization and/or application will be provisionally treated as the permanent reference coordinates of the protected circle. Eventually, pending applications will be disposed of and conditional licenses will either become licenses or be forfeited for failure to construct.

4. Alternative Uses of MDS Frequencies

59. The principal use of MDS frequencies is wireless cable service. Under Section 21.903(a) of the Commission's rules, 47 C.F.R. § 21.903(a), MDS stations are "generally intended to provide one-way radio transmission (usually in an omnidirectional pattern) from a stationary transmitter to multiple receiving facilities located at fixed points." At the same time, our rules permit use of MDS frequencies for other kinds of services. Section 21.903(b), 47 C.F.R. § 21.903(b), states that "[u]nless otherwise directed or conditioned in the applicable instrument of authorization, Multipoint Distribution Service stations may render any kind of communications service consistent with the Commission's rules on a common carrier or on a non-common carrier basis . . . ." We wish to emphasize that nothing in this *Report and Order* precludes either new licensees or incumbents from using MDS frequencies for other kinds of services pursuant to 47 C.F.R. § 21.903(b). We note, however, that such applicants may need to apply for waivers of certain MDS technical rules, such as 47 C.F.R. §§ 21.903(a) and 21.906.

B. INTERFERENCE CRITERIA AND DATA ELEMENTS

60. ***Proposals.*** As a complement to the filing proposals and electronic procedures, the *Notice* proposed to adopt a technical equation as the basis for the "free space" interference protection calculations. The Commission's MDS engineers currently utilize this formula and it is recognized by engineering consulting firms in the wireless cable industry:

> The received signal power level $(RSL)_{dBW}$ at the output of the FCC reference receiving antenna is obtained from the following: [41]
>
> $$(RSL)_{dBW} = (EIRP)_{dBW} - (L_{FS})_{dB} + (G_{AR})_{dB}$$
>
> where the free space loss $(L_{FS})_{dB}$ is
>
> $$(L_{FS})_{dB} = 20 \log (4\pi d/\lambda) \text{ dB}$$

In these equations, $(RSL)_{dBW}$ is received power in decibels referenced to one watt, $(EIRP)_{dBW}$ is equivalent isotropically radiated power in decibels above one watt, d is the distance of the signal path in meters, λ is the wavelength of the signal in meters, and G_{AR} is the gain of the reference receiving antenna, as obtained in 47 C.F.R. § 21.902(f)(3), Figure 1. The *Notice* proposed to formalize the above equations by adopting them as a rule provision as part of a plan to implement computerized interference studies. Additionally, the *Notice* stated that we will require proposed facilities to meet the 45 dB and 0 dB cochannel and adjacent channel

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[41] Leon W. Couch II, Digital and Analog Communication Systems, p. 384 (3rd ed. 1990).

desired-to-undesired signal strength ratios at points along the service contours of protected facilities which were authorized under the current interference standards. With regard to long-form applications, we proposed to retain the requirement in 47 C.F.R. § 21.902, that an applicant perform analyses of the potential for harmful interference and serve such interference studies upon the authorized or previously proposed station applicants, conditional licensees or licensees required to be studied, but we would not require the submission of a list of those served at the time the long-form application was filed. We explained that, on the revised long-form application form, the applicant would supply certain crucial data elements describing the station parameters, such as antenna polarization and the station EIRP, while the Commission staff would perform interference analyses using a computer program. The *Notice* stated that, although the submission of interference or other engineering analyses would not be required with the long-form application, we would require the applicant to make the records available for Commission inspection upon request. We also questioned in the *Notice* whether we should eliminate signal contour maps as a required part of the interference studies.

61. Pursuant to our streamlining effort, the *Notice* proposed to improve the current application form used for new MDS stations, FCC Form 494,[42] by excluding certain data elements which have yielded information that is no longer necessary or of only marginal utility. Specifically, we proposed to eliminate queries regarding the antenna vertical sketch and the narrative description of why grant of the application would be in the public interest. We further proposed to exclude the following parameters of the transmission system: transmitter manufacturer and model number, transmitter output power, transmitting antenna gain and the specification of transmission line and other transmission losses. We observed that with regard to transmitters, we are only concerned that MDS licensees operate transmitters that are "type-accepted" by the Commission for use in this service. Accordingly, we proposed to eliminate the requirement that the applicant identify the transmitter make and model, and simply require that the conditional licensee certify that its transmitter is "type-accepted" in its certification of completion of construction, currently FCC Form 494A. The MDS rules now provide for a maximum EIRP, rather than a maximum value for transmitter output power. *See* 47 C.F.R. § 21.904. Thus, the *Notice* stated, so long as the EIRP remains within the limits of Section 21.904, it is not necessary to require applicants to specify the equipment parameters used to calculate EIRP. The *Notice* also proposed to allow changes to these transmission parameters without notification to the Commission, provided the resulting EIRP would not change. The station power to be specified on the application form would be the maximum EIRP in the horizontal plane, *i.e.*, the EIRP at an angle of zero degrees in the vertical plane. We proposed to permit electrical beam tilting of antennas; however, in all cases, applicants would be required to specify the EIRP in the zero degree vertical (horizontal) plane. Where beam tilting is employed, the EIRP at the zero degree vertical angle will be less than the maximum EIRP at the tilt angle,

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[42] Since Form 494 is a multi-purpose form that is used for other services, to the extent that we are proposing changes, we intend to create a different form to be used for MDS.

due to the vertical suppression characteristic of the transmitting antenna. In most instances, this value of EIRP closely approximates the power radiated to the radio horizon which is most relevant to interference analysis. By proceeding in this manner, we would not need to collect data on antenna vertical radiation patterns.

62. The *Notice* proposed to further modify the long-form application in an effort to make the form compatible with an electronic filing system. At the present time, we propose to use a new long-form application together with the current FCC Form 430, the Licensee Qualification Report. An appendix to the *Notice* listed data elements and other informational items for our proposed new electronic application form, including general, engineering and legal elements. For example, we proposed to retain engineering data elements necessary for analysis of interference or possible air safety hazards, such as transmitting antenna site coordinates, EIRP, antenna polarization, site elevation and antenna structure height above ground. Other data would be used to verify an applicant's compliance with a particular Commission rule, such as when antenna beam width is used to calculate the maximum allowable EIRP of a station using a directional transmitting antenna. We also proposed to retain applicant responses which demonstrate compliance with a particular statutory requirement, such as an environmental assessment.

63. In reference to applicants locating stations in areas where notification or coordination with Canada or Mexico is required by international agreement, the *Notice* indicated that these applicants would be required to submit the following additional technical data, which were not proposed as standard data elements in the electronic long-form application: transmitter output power, transmitting antenna gain and transmission line loss. In addition to the EIRP at a vertical angle of zero degrees, applicants in the border areas will be required to specify the maximum EIRP at the vertical angle corresponding to the beam tilt. The *Notice* explained that the additional data requirements could be submitted in a textual exhibit to the electronic application or a paper supplement.

64. ***Comments.*** Several commenters support use of the proposed interference protection calculations and use of a computer-assisted interference program.[43] Vega suggests that the Commission make the program available to all users. The Association generally supports the formula but is concerned that the proposal to require proposed facilities to demonstrate compliance with the 45 dB and 0 dB D/U ratios only at points along the protected service area contour could prove problematic when terrain shielding protects the contour of the protected service area, but not internal points.[44] To avoid this problem, the Association recommends, the Commission should mandate that when terrain shielding is

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[43] *See, e.g.*, Comments of Hardin at 11; Mitchell at 3; Vega at 10; Association at 50; ACS Enterprises, *et al.* at 15.

[44] The Commission may waive its interference protection rules when it is apparent that the signal is blocked by a substantial terrain obstruction, referred to as terrain shielding.

relied upon to demonstrate interference protection at the boundary, an analysis be conducted of the potential for interference along the given radial at the point farthest from the desired station that is not terrain shielded, if any. Hardin supports use of the formula and points out, however, that the *Notice* fails to address frequency offset and terrain shielding.

65. Dalager, Hammett & Edison, Inc. (Hammett) and Marshall state that the proposed interference protection calculations are too simplistic and thus inadequate because they fail to consider terrain shielding, frequency offset or cross polarization. Comments of Dalager at 3; Hammett at 1-2; Marshall at 8. Hammett further explains that use of EIRP in the horizontal plane ignores beam tilt, concluding that many completely sound designs would be rejected if this approach is used. Marshall suggests that the free space propagation formula be combined with the equation for desired-to-undesired signal strength ratio.

66. Five parties discuss the submission of maps with the engineering proposal in the long-form application. Dalager recommends that the Commission examine adjacent channel MDS stations only as far as 25 miles away, rather than 100, and cochannel stations only far enough out that a signal reaches their protected area, rather than a mandatory 100 miles. Hardin agrees with Marshall's contention that there is no need for 100-mile maps of adjacent channel stations and suggests that investigating potential for adjacent channel interference within 50 miles should be sufficient.[45] Mitchell asserts that signal contour maps, while not a requirement, should be encouraged to prove interference free operation because they will enhance the acceptability for new applications. Vega agrees with Commission's proposal to modify 47 C.F.R. § 21.902(c)(2) and eliminate the map requirement. Hardin requests that we standardize the methodology used to demonstrate terrain shielding, suggesting the use of shadow maps as the most efficient method.

67. The Association states that the list of proposed data elements and other informational items for our proposed new electronic application form, including general, engineering and legal elements, appear to be appropriate. We received several specific comments in response to our proposal to exclude certain data elements which have yielded information that is no longer necessary or of only marginal utility. Caritas agrees with the *Notice*, that transmitter power ratings should no longer be required, but Hammett contends that the Commission should not eliminate the requirement that applicants specify the parameters used to calculate EIRP. Comments of Caritas at 3; Hammett at 2. Hammett believes that the Commission needs the details on how EIRP was calculated because it is important to allow others to check the accuracy of claimed EIRP values. Similarly, Vega recommends that the Commission retain the antenna vertical profile sketch because it plays an important role in the attributes of mounting configurations of a particular MDS facility in relationship to other services utilizing the structure and gives general identification of the type of structure, which can be particularly helpful under situations such as elaborate

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[45] This issue is the subject of a petition of reconsideration of *Report and Order*, PR Docket 92-80, 8 FCC Rcd 1444 (1993).

structure mounting configurations like the Empire State Building. Vega believes that the long-form application should retain the questions on detailed technical information, such as transmitter type, transmission line loss and/or antenna gain including antenna manufacturer and model number, currently requested on Form 494. Caritas agrees with the Commission's proposal to retain the notification requirement of cochannel and adjacent channel licensees and permittees, and further recommends that applicants maintain application summaries and make them available to entities with sites within a 75-mile radius upon request.

68. Some commenters suggested that we eliminate specific requirements. Many commenters request elimination of the requirement under 47 C.F.R. § 21.902(i)(3), to serve, by certified mail, a copy of the interference analysis on ITFS licensees or permittees, and one of those parties requests that we revise Section 21.902(c) to eliminate the requirement to file interference studies for previously proposed MDS stations which at one time had been informally classified as a lottery loser. Crowell & Moring and CAI Wireless argue that a licensee should be permitted to establish transmitter sites anywhere within the boundaries of its service area or modify its facilities without prior approval from the Commission, so long as the licensee subsequently files the technical details and certifies that the modification complies with the interference protection requirements. Comments of Crowell & Moring 8-9; CAI Wireless at 8. CAI Wireless also suggests that the Commission end its regulation of beam benders, multiple transmitter systems and other engineering solutions which expand service quickly to underserved areas.

69. ***Resolution.*** With some additional clarification, we will adopt the proposals raised in the *Notice*, including the free space equation and the proposed data elements for the long-form application. A draft long-form application, FCC Form 304, is attached as Appendix D.[46] We will develop computer programs that will help to streamline the processing of the long-form and modification applications of MDS incumbents and BTA authorization holders. A program is being designed that will perform cochannel and adjacent channel interference analysis at one degree intervals along the protected 35-mile circle of incumbents' authorized stations or protected station proposals. This program, as envisioned, will use the Commission's three-second terrain data base to check for unobstructed signal paths between the site of the station being studied and points along the incumbent's protected contour. For those radials on which line-of-sight conditions do not exist, either due to a terrain obstruction or the earth's curvature, the program will conclude that interference would not occur at that point. We note, following long-standing Commission practice, that all line-of-sight determinations will assume a receiver height of 30 feet and a standard 4/3 earth radius for determining the electrical horizon. Where line-of-sight conditions exist, the program would first determine the proposed station's EIRP in the pertinent direction, based on the EIRP and horizontal relative field strength tabulation given in the application. The

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[46] The Office of Management and Budget has not yet approved the FCC Form 304 pursuant to the Paperwork Reduction Act. A public notice will be issued when the new form has been approved and is available for use.

received signal power level of the proposed station, the "undesired signal" (U), will then be calculated using the free space equation. The value of the receiver antenna gain in this calculation will depend on the angular relationship between the radial azimuth and the orientation of the receiving antenna. We will assume that the latter is pointed toward the station being received. The gain will also depend on whether the proposed station is cross polarized or co-polarized with respect to the protected station. The receiving antenna gain will be that of the reference receiving antenna found in Section 21.902(f)(3), Figure 1 of the Commission's rules. We here establish a fixed value for the "desired signal" level at the 35-mile boundary. Assuming a receiver antenna gain of 20 dB above an isotropic antenna, an EIRP of 2000 watts (33 dBw) and a frequency of 2638 MHz, the midpoint frequency between channels E1 and H3, the free space propagation equation gives a value of - 82.9 dBw. Our computer program will therefore use a received power level ("D") of - 83 dBw as the value of the desired signal strength. Finally, the program will compute the value of the desired-to-undesired signal strength ratio ("D/U"), which in logarithmic units is expressed as D - U. This value will be tested against the minimum standard of 45 dB.

70. Another program is being designed that will analyze the impact of incumbents' modification applications. This program will analyze 360 radials spaced by one degree, first checking for unobstructed line-of-sight paths to the 35-mile boundary and, for clear paths, calculating the free space signal strength that would result from the modification and comparing it to the maximum allowable limit; that is, a power flux density value of - 73 dBw/m^2. To the extent that we are not constrained by licensing agreements with third parties and to the extent resources are available, we will make our computer programs available to the public. This will be announced in a subsequent public notice.

71. We emphasize that we will use computer models as application processing tools. Similar processing tools have been successfully used for Low Power Television Service with very few reported cases of interference to television reception, none of which occurred inside of a station's protected contour. The MDS interference standards should not be confused with the processing methods, which can only approximate the standard. For example, under the interference standards, incumbents' 35-mile areas are to be protected not only at points along the boundary, but also within the boundary.

72. Although, as applicable, we will require MDS applicants to prepare interference analyses or notification of application filings, and serve these on potentially affected parties, we will generally not require that such studies or a list of the parties served be included with applications. However, since electronic filing will be implemented in this service on a voluntary basis, we will allow applicants to submit interference studies with their applications on a voluntary basis. Applicants may also submit negotiated agreements of tailored interference protection or operation on the basis of frequency offset. Applicants may submit terrain shielding studies based on methods of their own choosing, including shadow maps. There are no universally accepted methods for terrain shielding studies given the widely varying characteristics of terrain features. Therefore, we believe it is appropriate to afford applicants the flexibility to select a terrain model suitable to the terrain being analyzed.

Additionally, we are persuaded by the comments that interference studies should no longer be required to include contour maps. As Marshall points outs, contour lines can be used in several ways and are most useful when drawn on a terrain shadow map, which is not a required element in the application process. Applicants may continue to prepare interference studies with D/U contour lines at their discretion. Given the structure and processing tools associated with our new licensing approach for the MDS service, we will not prescribe how applicants' interference studies are to be conducted. Further, potentially affected parties who are served a study and disagree with its conclusions may file a petition to deny an application.

73. As contemplated in our *Notice*, we intended to streamline our application forms in accordance with our actions herein. We are, therefore, directing the staff to incorporate as appropriate those data elements previously listed in the *Notice* into a revised and reformatted long-form application for use in the future by MDS applicants seeking to construct new stations or to make changes in their authorized facilities.

C. ELECTRONIC FILING AND ELECTRONIC FEE PAYMENTS

74. ***Proposals.*** In the *Notice* we invited comment on the feasibility of utilizing mandatory electronic filing for new MDS applications, on whether ITFS applicants should be required to file applications for new stations electronically on a combined application form,[47] and on whether there should be a paper exception for those educators that are not financially supported by a wireless cable operator. *Notice* at 7676-77. The *Notice* suggested that communication links could be used to exchange application data between applicants and the Commission, thus minimizing the filing of paper with the Commission and allowing the Commission to process MDS and ITFS applications more efficiently. Pursuant to the proposal, an electronic form would be designed for personal computers using a Windows based environment, and consisting of a series of computer screens. One possible approach identified in the *Notice* involves the use of electronic mailboxes such as that of a Value Added Network (VAN). Applicants would transmit relevant data from their personal computer to a VAN electronic mailbox. The VAN would, in turn, convert the data into a format compatible with Commission files and download the information to an electronic mailbox at the Commission. In the *Notice*, we recognized the possible limitations of this approach with respect to maps and other graphic representations. We envisioned that the public would have on-line viewing access to our data bases, perhaps through a third-party vendor in addition to access at the Commission's public reference room.

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[47] In 1992, Congress amended the Communications Act of 1934 to permit the electronic filing of license and construction permit applications. *See* Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, § 204, 106 Stat. 3533, 3543, codified at 47 U.S.C. §§ 308(b) and 319(a). Such applications may be signed "in any manner or form, including by electronic means, as the Commission may prescribe by regulation." *Id.*

75. In the *Notice*, we also proposed expanding the acceptable methods of payment for application fees to include electronic payment under 47 C.F.R. § 1.1109.[48] We stated our intention of announcing the procedures for the electronic payment of fees in a public notice, pursuant to Section 1.1109(a)(1). We sought comment regarding a fee system where applicants use a unique fee payor number together with an appropriate service code and a suffix in cases where applicants file multiple applications, in order to link the fee payment with the electronically filed application.

76. ***Comments.*** The majority of commenters support the Commission's initiative to implement electronic filing and agree that access by the public to the data base would facilitate more accurate and up-to-date information concerning filings with the Commission. Commenters are split on whether electronic filing should be mandatory or voluntary. In addition, many commenters believe that the Commission should adopt a hybrid approach to electronic filing, permitting paper filing of graphic representations and maps. A number of commenters express concern regarding what software and access method would be used, stressing that the Commission should implement a solution that is user-friendly and able to accommodate multiple operating environments. A few commenters express concern about data security and system reliability. We received no objections to electronic fee payment. Specific comments are discussed below.

77. Commenters who support an electronic filing approach have differing views on whether electronic filing should be mandatory or voluntary.[49] The Association's position is that electronic filing should be mandatory, noting that the costs of electronic filing are small compared to the costs of constructing and operating MDS or ITFS stations. Furthermore, the Association asserts that the entire electronic filing system would be compromised if some or all ITFS licensees were exempted, because the data base would then no longer be complete or definitive. ITFS Parties share this view. However, ITFS Parties suggest that the Commission consider permitting, for a short transition period, applicants who filed paper copies to refile their applications electronically within thirty days of Commission notification if they certify that they were unaware of the electronic filing mandate. Further, ITFS Parties suggest that the Commission not require that all ITFS filings be electronically filed (*e.g.*,

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[48] The Commission recently amended 47 C.F.R. §§ 1.1108 and 1.1109 to permit the electronic filing of fee payments, initially on an experimental basis. *Implementation of Section 9 of the Communications Act, Report and Order* in MD Docket No. 94-19, FCC No. 94-140 (released June 8, 1994), 59 Fed. Reg. 30,984 (June 16, 1994) at ¶¶ 50-51.

[49] *See, e.g.*, Comments of Association at 47; and ITFS Parties at 2 (calling for mandatory electronic filing). ITFS Parties includes South Carolina Educational Television Commission, State of Wisconsin-Educational Communications Board and University of Maine System. *See, e.g.*, Comments of Rural Wireless at 12-13; Caritas at 4; National ITFS at 4; Pepper & Corazzini, L.L.P. (Pepper) at 8; and Multi-Micro at 2 (calling for voluntary electronic filing).

certifications of completion of construction, assignments and transfers).

78. Conversely, several commenters propose voluntary electronic filing, claiming that smaller applicants might not have access to the technologies necessary for completion and submission of applications via electronic filing, and that an immediate and mandatory conversion to an electronic filing system could undermine the goals of the proposal, in part due to technical questions and applicant confusion. For instance, Caritas claims that mandatory electronic filing would unfairly advantage larger educational institutions which have familiarity with, and access to, electronic networks. Similarly, National ITFS believes that mandatory electronic filing would place an unusual and onerous burden on educators whose application is not supported by an excess capacity lessee, and who may never apply for more than four channels. Pepper believes that the Commission should organize a committee to recommend Commission-wide electronic filing standards and procedures for all services. A few commenters express reservations about electronic filing and whether it would increase processing efficiency. *See, e.g.,* Comments of Marshall at 10-12; Vega at 14-15. Vega proposes that if the Commission implements electronic filing at all, it should proceed slowly in making a transition from paper to electronic filing.

79. Dalager and ITFS Parties agree with the Commission's observation in its *Notice* that electronic filing could be problematic in terms of feasibility and cost, with respect to graphic representations and maps. *See* Comments of Dalager at 3; ITFS Parties at 3. Dalager and ITFS Parties therefore propose that the Commission consider a hybrid system using both paper and electronic filing.

80. A number of commenters provide suggestions and recommendations regarding the type of software to be used and access methodology for electronic filing.[50] Essentially, commenters stress the need to carefully consider alternative approaches, access methodology, compatibility issues, ease of use and associated expense. For example, ITFS Parties propose that the use of the Internet, rather than a VAN for electronic filing may be a viable option, due to wide access to the Internet, and claim that use of a VAN would simply add to the applicants cost of filing. Marshall claims that generally, engineering software used for MDS saves graphical information (such as shadow maps and radio path studies) in standard Hewlett Packard Graphics Language (HPGL) format, and suggests that whatever standard is used for electronic filing be compatible with HPGL. Hardin also holds the view that whatever standard is used, it should be compatible with HPGL. Pepper proposes that whatever software is used, it should be readily available, inexpensive, able to accommodate multiple platforms and it should be easy to access with standard communication software and protocols.

81. Pepper is concerned about computer security, including the authentication of the

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[50] *See, e.g.,* Comments of ITFS Parties at 3-5; Marshall at 11-12; Pepper at 3-6; Reply Comments of Hardin at 6.

filing parties, and stresses the need for protection of confidential data. Vega is concerned about the security of the transfer protocol. A number of commenters, including Caritas, ITFS Parties and Pepper, note that a process should be put in place which enables applicants to ascertain what information was received by the Commission and on what date. These applicants express a need for an immediate and documentable confirmation of receipt, such as that which currently exists with date stamping. Pepper also stresses the need for selecting a reliable network capable of handling large volumes and having a reliable back-up system.

82. We received no objections to electronic fee payments. Vega expresses support for the Commission's adoption of a method of accepting electronic payments, assuming that other current forms of payment remain an option. Comments of Vega at 15; *See* Comments of Association at 50. Other commenters declined to address electronic fee payments.

83. ***Resolution.*** We will authorize voluntary electronic filing for new MDS applications. Use of an electronic filing system is not as essential under the filing approach we adopt today because we anticipate that fewer long-form applications will be filed. We also considered the burden on educators and determined that applications for new ITFS stations will not be included at this time. We appreciate the concerns expressed by commenters, including the cost to applicants of implementing and using electronic filing, data security and system reliability issues. We will take these concerns into account in deciding upon the software which will be used and the access method for electronic filing. We agree with commenters who encourage the Commission to evaluate carefully alternative electronic filing approaches and who suggest a transition period from paper filing to electronic filing. At the present time, we decline to accept the proposal put forth by Pepper regarding the establishment of a committee to recommend Commission-wide standards and procedures for all services, noting that the merits associated with the formation of such a committee would be outweighed by factors such as delayed decision making and implementation of electronic filing. Through subsequent public notices we will provide specific details concerning the method for electronically filing MDS applications. We will also authorize electronic fee payment for MDS applications. Current methods of payment available under 47 C.F.R. § 1.1109 will continue to be accepted. As our resources permit, we will work toward improved viewing access to the data bases.

D. COMPETITIVE BIDDING PROCEDURES

1. Competitive Bidding Background

84. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-611 (Communications Act). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for certain initial licenses. The Commission adopted a *Notice of Proposed Rule Making* in the competitive bidding proceeding on September 23,

1993.[51] In its March 8, 1994 *Second Report and Order*,[52] the Commission established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services, including MDS. We indicated in the *Second Report and Order* that in subsequent Reports and Orders we would set forth specific competitive bidding rules that would be applicable to individual services. To date, the Commission has established competitive bidding rules specifically applicable to, and has conducted auctions for, narrowband Personal Communications Services (PCS),[53] the Interactive Video and Data Service (IVDS),[54] and broadband PCS.[55] This *Report and Order* establishes competitive bidding rules and procedures for MDS.

85. Given the interdependencies we believe exist between authorizations for certain BTA service areas and the declining cost of conducting simultaneous multiple round bidding, we choose this auction method for use in MDS. We also adapt the general procedures set forth in the *Second Report and Order* so as to be compatible with the application procedures established for MDS in this *Report and Order*. Finally, we set forth rules to deter possible abuses of the bidding and application procedures, and establish special provisions for small businesses, including those owned by minorities and women, to encourage their participation in the competitive bidding process and in the provision of MDS system offerings.

2. Auction Eligibility

86. The Commission has in the past employed a random selection process (*i.e.*, a lottery) to select from among mutually exclusive MDS initial applications. *See* 47 C.F.R. § 1.824. However, Section 309(j) of the Communications Act, as amended, permits auctions where (1) mutually exclusive applications for initial licenses or construction permits are

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[51] *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) (*Competitive Bidding Notice*).

[52] *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*), *recon. granted in part, Second Memorandum Opinion and Order,* 9 FCC Rcd 7245 (1994) (*Second Memorandum Opinion and Order*).

[53] *Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) (*Third Report and Order*), *recon. granted in part, Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making,* 10 FCC Rcd 175 (1995) (*Third Memorandum Opinion and Order*).

[54] *Fourth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Fourth Report and Order*), *petition for recon. pending.*

[55] *Fifth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) (*Fifth Report and Order*), *recon. granted in part, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1995) (*Fifth Memorandum Opinion and Order*).

accepted for filing by the Commission; (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals; and (3) the objectives set forth in Section 309(j) would be promoted. In the *Second Report and Order*, we concluded that single and multichannel MDS as classes of services would satisfy the Section 309(j) criteria for auctionability, and, thus, new initial applications in MDS would be eligible for competitive bidding. *Id.* at 2359. The *Second Report and Order* did not, however, expressly resolve the question of the auctionability of mutually exclusive MDS station applications filed prior to July 26, 1993, the date specified in the Commission's auction authority in the 1993 Budget Act. *Id.* For the reasons set forth in Section 3 below, we now determine to lottery these previously filed MDS applications.

3. Disposition of Previously Filed MDS Applications

87. Before the Commission conducts competitive bidding for the BTA service areas applied for under the revised procedures set forth herein, we must first process the remaining acceptable, mutually exclusive applications for MDS station licenses that were filed prior to July 26, 1993.[56] Under the procedures in effect prior to the enactment of competitive bidding authority in the 1993 Budget Act, these mutually exclusive MDS applications were to have been lotteried. In September 1993, the Commission tentatively concluded to lottery rather than auction pre-July 26, 1993 MDS applications. *See Competitive Bidding Notice* at 7661. In reaching this decision, the Commission first noted that these applications had already incurred substantial delays. The Commission then tentatively decided to eschew auctions in favor of lotteries for pending MDS applications to avoid "further delay" in granting MDS station licenses and providing service to the public during the time it would take for the Commission to promulgate competitive bidding rules. *Id.*[57] Subsequently, in the *Second Report and Order*, the Commission concluded that new initial applications in MDS would be eligible for competitive bidding, but did not resolve the question of whether to employ lotteries or auctions to dispose of the previously filed MDS applications. *Second Report and Order* at 2359. Thus, due to processing delays and further delays resulting from the consideration of issues raised in the Budget Act regarding competitive bidding, this group of previously filed MDS applications, through no fault of the applicants themselves, has never been lotteried.

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[56] Once we complete our processing, we expect that this group of previously filed, acceptable MDS station applications will likely be quite small, consisting of approximately 100 mutually exclusive applications for five rural locations. The applications for these five locations have been pending since 1991.

[57] We note that commenters supported the Commission's tentative conclusion to lottery previously filed MDS applications. *See, e.g.,* Comments of JAP Telecom Systems, Inc. at 7 and Comments of MW TV, Inc. at 2-3, filed in response to *Competitive Bidding Notice.*

88. The 1993 Budget Act empowers the Commission to either auction or lottery these previously filed MDS applications.[58] Consistent with the statute, our tentative conclusion in the *Competitive Bidding Notice*, and Commission precedent,[59] we now exercise our discretion to lottery this group of remaining previously filed, mutually exclusive MDS applications. By employing lotteries for pre-July 26, 1993 MDS applications, and by holding auctions for initial applications accepted for filing after that date, we adopt a straightforward approach that is easy to apply, fair to the applicants and serves the public interest.

89. As previously noted by the Commission, the Budget Act's legislative history reflects Congress' recognition that equitable considerations and administrative costs may justify the use of lotteries for those applicants who, in reliance on the existing lottery procedures, had filed applications prior to July 26, 1993. *See Cellular Unserved Order* at 7391. In examining the equities and administrative costs at stake here, and based on the record before us, we believe that the public interest would be served by using a lottery to dispose of the relatively few remaining previously filed MDS applications for the handful of locations at issue. Indeed, we believe this situation presents facts that are precisely the type that warranted the grant of discretion to the Commission on this point. Specifically, with regard to equitable considerations, we note that most of these MDS applications on file have been pending for over four years due to the aforementioned processing delays, which were not the fault of the applicants.[60] Particularly given this lengthy delay, we believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for BTA service areas, as they submitted their applications with the expectation of participating in a lottery for a site-specific conditional station license. Our decision will ensure that these pending applications will be processed under the rules in effect at the time the applications were filed. It will also result in similar treatment for MDS applications filed within the same general time period. Those few applications that remain pending due to administrative delay will be processed in a manner similar to other MDS applicants that filed prior to July 26, 1993, but were able to have their applications processed and conditional station licenses granted under the lottery procedures then in effect.[61]

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[58] *See* 47 U.S.C. §§ 309(i) & (j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993).

[59] *See Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) (*Cellular Unserved Order*) (determining to lottery previously filed applications for cellular unserved areas).

[60] This four year period that these previously filed MDS applications have been pending is considerably longer than the one year period that the cellular unserved applications had been on file before the Commission determined to lottery those applications.

[61] Likewise, the winning applicants for the small number of lotteries held pursuant to this decision will receive the benefits of the expanded protected service area definition for site-specific stations that we adopt today in a companion item. *See Second Order on*

90. Moreover, if the Commission were to require the previously filed MDS applicants to participate in an auction, it would be necessary to allow the applicants to submit the information required by the competitive bidding rules set forth herein. In contrast, a lottery would require no further submissions by the applicants, and could be conducted almost immediately, unlike an auction, which likely could not be held until the end of this year. Furthermore, in fairness to the previously filed applicants, those who indicate no desire to participate in an auction may be entitled to a refund of their application fees. Given the expected low commercial value of the MDS channels in the small number of rural locations at issue here,[62] we feel that these administrative costs associated with conducting an auction for the approximately 100 previously filed applications would not be justified. *See Cellular Unserved Order* at 7391-7392. In summary, we believe that it would be inequitable and administratively burdensome to require applicants for MDS station licenses, who filed their applications over four years ago in reliance upon the lottery procedures then in effect, to participate in an MDS auction.

91. We also believe that any concern that many of these previously filed MDS applications at issue were prepared and filed by the same entities on behalf of the individual applicants "does not, by itself, justify the use of auctions in these circumstances." *Id.* at 7391. There is no evidence before us that these individual applicants, if awarded an MDS conditional station license by lottery, would not construct and operate an MDS station. These applicants did expend the time and the funds required to have their MDS station applications prepared and filed, and we have no evidence, on the record before us, to conclude that they will fail to construct an MDS station and provide service to the public. *See, e.g.,* Comments of MW TV, Inc. filed in response to *Competitive Bidding Notice* at 2 (stating that it would be "terribly inequitable" to force MW TV into a "bidding process to secure [MDS] authorizations for which it has already expended a substantial amount of funds").[63]

Reconsideration. Thus, the approximately five lottery winners of site-specific conditional station licenses will be afforded treatment similar to other applicants who filed applications for site-specific MDS licenses prior to July 26, 1993, but who managed to avoid administrative delay and to have their applications processed and conditional licenses granted.

[62] As we note in our discussion of the treatment of designated entities (*see infra* Section 7), for various reasons unique to MDS we anticipate that the BTA service areas will be auctioned for relatively modest amounts under our prospective licensing regime. It seems reasonable to assume that the small number of rural, site-specific MDS conditional station licenses at issue here would draw even less money at auction than the relatively modest amounts we anticipate for the larger geographic areas that will be auctioned in the future.

[63] We emphasize that the MDS station applicants prevailing in a lottery will be subject to a one year build-out requirement. *See* 47 C.F.R. § 21.43 (requiring completion of construction of MDS stations within twelve months from date of conditional station license

92. Moreover, dismissal of these previously filed applications without prejudice to participate in a future BTA auction -- on the basis of a theory that the service for which the applicants previously applied either has changed significantly or no longer exists -- presents several potential drawbacks. Significantly, dismissal of these pending applications likely would engender reconsideration proceedings at the Commission and legal challenges in the courts. Such administrative and judicial delays could further postpone granting MDS licenses and providing service to the public, contrary to the public interest. In addition, while we are changing the conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection, we are not fundamentally changing the nature of the service. Licensees still will be providing wireless cable service to subscribers, albeit under altered conditions designed to make the service more competitive with cable television. Therefore, on the basis of this record, and considering the equitable and administrative factors identified above, we conclude, as we did in the *Cellular Unserved Order*, that the use of a lottery, rather than competitive bidding, to award MDS conditional station licenses to the remaining previously filed applicants would best serve the public interest.

93. We also conclude that our balancing of the equitable and administrative factors identified above to determine whether a lottery or an auction of the previously filed MDS applications best serves the public interest is consistent with the specific terms of the 1993 Budget Act and existing relevant case law. We note that the factors set forth in Section 309(j)(3) pertaining to competitive bidding methodologies do not specifically govern the decision as to how to treat these previously filed MDS applications. The Section 309(j)(3) factors are incorporated into Section 309(j)(2) as part of the determination of whether a service "may" be auctioned. 47 U.S.C. § 309(j)(2) & (3). There is no doubt that we have the authority under the statute to use auctions to dispose of these previously filed applications for MDS station licenses, if using auctions satisfies the Section 309(j)(3) factors. Rather, the question before us here is not whether we *may* utilize an auction, but whether we *should*. For that determination, the relevant provision of law is Section 6002(e) of the Budget Act.

94. Section 6002(e), entitled "Special Rule," made an exception to the general requirement that, if a service met the standards for auctionability under Section 309(j)(2), the Commission could not use a lottery to award licenses for such service. Under the Section 6002(e) Special Rule, the Commission may use a lottery to award licenses even for an otherwise auctionable service for certain previously filed applications. In adopting this provision, Congress indicated that the exception would "permit" the Commission to use lotteries for certain IVDS and "several other licenses." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993). Thus, even if the factors set forth in Section 309(j)(3) are met with regard to auctions, our discretion under the Section 6002(e) Special Rule to choose lotteries for other reasons is not diminished.

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grant).

95. Congress did not, however, establish any standards for the exercise of the Commission's discretion under the Special Rule. As set forth in the *Cellular Unserved Order*, we continue to believe the proper approach is to balance the advantages and disadvantages of lotteries and auctions to determine which best serves the public interest on the facts before us. This approach is consistent with judicial precedent, which indicates that in determining whether to apply new rules to pending applicants, the Commission should balance the "ill effect" of the new rule on the pending applicants with the "mischief of frustrating the interests the rule promotes." *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987). In certain circumstances, as in *Maxcell*, which involved switching from comparative hearings to lotteries in the cellular radio service, the benefits in broadly applying the Commission's new rules outweigh the harms to previously filed applicants. In the situation before us, however, as in the *Cellular Unserved Order*, we conclude, for the reasons discussed above, that the "ill effects" on the applicants that previously filed applications substantially outweigh any potential "mischief" that may be caused to the development of MDS in the small number of rural markets likely at issue. Accordingly, we conclude that the use of lotteries for these few pending applications best serves the public interest.

4. Competitive Bidding Design

96. In this *Report and Order*, we have attempted to design auction rules and procedures that are compatible with the unique characteristics of MDS and that meet the congressional objectives set forth in the Communications Act. *See* 47 U.S.C. § 309(j)(3). We believe that these objectives are embodied in two basic Commission policy goals: promoting economic growth and enhancing access to telecommunications service offerings for consumers, producers and new entrants. *Second Report and Order* at 2349-2350. In the paragraphs below, we implement competitive bidding for MDS, pursuant to Section 309(j) of the Communications Act and based on the record in this proceeding.[64] The methodology and

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[64] Very few comments were filed in response to the *Competitive Bidding Notice* addressing either the applicability of competitive bidding to mutually exclusive MDS initial applications or the auction method to be employed for MDS. MW TV, Inc. and JMP Telecom Systems, Inc. commented solely on whether to apply competitive bidding rules to pending MDS applications. The Association was the only commenter to address the issue of MDS auction design.

In the *Notice*, the Commission invited further comment concerning MDS competitive bidding procedures. Of the twenty-two sets of comments submitted in response to this *Notice* and listed in Appendix A, comments relating to competitive bidding in particular were submitted by American Telecasting, CAI Wireless, ACS Enterprises, *et al.*, Dalager, Heartland, Mitchell, PacTel, Vega, Rural Wireless, U.S. Wireless and Association. Only eight commenters addressed MDS auction design specifically (American Telecasting, CAI Wireless, ACS Enterprises, *et al.*, Heartland, Mitchell, PacTel, Vega and Association). Reply comments addressing competitive bidding issues were submitted by American

procedures we will utilize in conducting MDS auctions are identified below, and additional details about specific competitive bidding procedures will be provided by public notice prior to the MDS auction.

a. General Competitive Bidding Designs

97. The *Second Report and Order* established the criteria to be considered in selecting the auction methodology for each auctionable service. We generally concluded that awarding licenses to those parties that value them most highly will best advance congressional policy goals. *Id.* at 2360. We also indicated that, because a bidder's ability to introduce valuable new services and to deploy them rapidly, intensively and efficiently increases the value of the license to that bidder, an auction design that awards licenses to those bidders who are willing to pay the highest bid tends to promote the development and deployment of new services and the efficient and intensive use of the spectrum. *Id.* at 2349-2350.

98. With regard to auction methodologies specifically, the Commission previously determined that: (1) licenses with strong interdependencies should be auctioned simultaneously;[65] (2) multiple round auctions, by providing bidders with information regarding other bidders' valuations of licenses, generally will yield more efficient allocations of licenses and higher revenues, especially where there is substantial uncertainty as to value; and (3) because they are relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions become less cost-effective as the value of licenses decreases. *Second Report and Order* at 2360. We also found that simultaneous multiple round bidding facilitates the efficient aggregation of licenses across spectrum bands and geographic areas, and, because of the superior information and flexibility this bidding methodology provides, is likely to yield greater revenues than other auction designs. Thus, we concluded in the *Second Report and Order* that the use of simultaneous multiple round bidding would generally be preferred. *Id.* at 2366.

99. We also recognized in the *Second Report and Order* that simultaneous multiple round bidding may appear more complex to bidders and could be more difficult and expensive to implement than other auction methods. *Id.* at 2364. We have, however, in the past year gained considerable experience in conducting simultaneous multiple round bidding. This competitive bidding method has been utilized in several narrowband and broadband PCS

Telecasting, ACS Enterprises, *et al.*, Telephone Cooperative, Rural Wireless, CAI Wireless and Association.

[65] Licenses are interdependent when the value of a license to the bidder depends on the other licenses that the bidder acquires. *Second Report and Order* at 2361. Licenses may be interdependent because they are substitutes or because they are complements. *Id.* at 2364.

auctions,[66] and has proved to be an efficient and effective way to conduct spectrum auctions. In addition, the cost to the Commission of conducting simultaneous multiple round bidding has decreased considerably since the initial simultaneous auctions because the computer software used in these auctions has now been developed. We have also recently initiated procedures permitting remote bidding from personal computers throughout the country. Consequently, bidders may now participate in simultaneous multiple round auctions in a variety of ways -- on site, by personal computer using remote bidding software, or via telephone.

b. MDS Competitive Bidding Design

100. Given our growing and successful experience with this auction design, we conclude that the generally favored method of simultaneous multiple round bidding is appropriate for MDS. We accordingly adopt this method to auction the BTA service areas.

101. In the *Notice*, we had tentatively concluded that simultaneous multiple round bidding was less appropriate for MDS than other auction methods primarily because the "value of and interdependence between" the geographic service areas might not be "sufficiently high to justify the use" of the generally preferred auction method. *Notice* at 7678. After further consideration, and based upon our continuing successful experience with simultaneous multiple round bidding, we now conclude that simultaneous multiple round bidding is in fact appropriate for MDS.

102. With regard to the expected value of the BTA service areas at auction, we realize that some areas -- particularly those with sparse populations -- may be auctioned for relatively modest amounts.[67] The value of any BTA service area at auction will, however, vary, depending in large part upon the population of and the amount of usable spectrum in that area.[68] Heavily populated BTA service areas may therefore attract more substantial

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[66] The Commission has also recently proposed to utilize simultaneous multiple round bidding for both the 800 and 900 MHz Specialized Mobile Radio services. *Further Notice of Proposed Rule Making* in PR Docket No. 93-144 and PP Docket No. 93-253, FCC 94-271 (released Nov. 4, 1994); *Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995).

[67] *See, e.g.*, Comments of Vega at 18; Association at 43; American Telecasting at 5-7; ACS Enterprises, *et al.* at 17 (asserting that MDS channels are low valued).

[68] *See* Comments of CAI Wireless at 9 (population of the relevant area, availability of ITFS and MDS channels, and bidder company business strategies "will substantially impact the valuation of 'area licenses'"). Wireless cable valuations, whether of companies, systems or channels, have generally been done on a population basis. *See, e.g.*, Gerard Klauer

sums, depending on the availability of spectrum within such areas. *See* Comments of PacTel at 3 (noting that "areas with the largest populations should be of significant value"). Given the substantially decreased costs associated with implementing simultaneous multiple round bidding, we believe that BTA service area values are sufficient to justify the use of this auction method. We must consequently disagree with the commenters who state that simultaneous multiple round bidding is inappropriate for MDS because this auction method is overly expensive, particularly when compared to an open outcry method, and administratively complex for the Commission. *See* Comments of ACS Enterprises, *et al.* at 17-19; Vega at 18. *See also* Comments of Association at 43-44 (supporting use of open outcry method on grounds of cost and complexity, if national filing window approach is adopted).[69]

103. With regard to the question of interdependence, we believe that the BTA service area authorizations to be auctioned possess a degree of interdependence. As explained in the *Notice*, "[t]here appears to be some geographic interdependence due to coordination of interference at the borders." *Id.* at 7678. Indeed, because we have selected a filing approach based on predetermined geographic areas, rather than a national filing window, we emphasize that authorizations for adjacent BTA service areas will be interdependent, as common ownership of such areas will reduce problems of controlling interference at the borders of the BTAs. *See Second Report and Order* at 2364; *See also* Comments of Association at 37 (adjacent geographic markets may be interdependent). Interdependence between the BTA authorizations may also arise from economies of scale achieved by wireless cable operators spreading of fixed costs over more units of output. *See Second Report and Order* at 2364; *See also* Comments of PacTel at 3 (there may be interdependencies "due to the desire to achieve significant economies of scale"). We accordingly conclude that there is some degree of interdependence between BTA authorizations and that this interdependence may be significant for geographically contiguous BTAs. *See* Comments of PacTel at 3 (noting "some significant interdependence" between "contiguous markets"). Thus, the

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Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 3; Singer, *Wireless Values: Wall Street Eyes Management and Spectrum*, Private Cable and Wireless Cable (Nov. 1994) at 21; Paul Kagan Associates, Inc., *Wireless Cable Investor* (Nov. 30, 1994) at 7.

[69] Other commenters, while not explicitly asserting that simultaneous multiple round bidding is overly complex and expensive for the Commission, nonetheless support the use of oral bidding for MDS on the grounds that an open outcry auction would be simple and economic (*see* Comments of CAI Wireless at 9) or efficient (*see* Comments of Heartland at 9-10; American Telecasting at 25). We do not dispute that oral bidding can be a cost-effective and efficient method of auctioning spectrum. However, we believe that, for the reasons described above, simultaneous multiple round bidding will be more cost effective and efficient for MDS than oral bidding, particularly given the interdependencies that exist between authorizations for adjacent BTA service areas.

adoption of simultaneous multiple round bidding should result in the most efficient award of these BTA authorizations. *See Second Report and Order* at 2363. In particular, we believe that potential bidders that operate (or are planning to operate) MDS systems in geographically adjacent BTAs and/or in several regions of the country will be able to make more informed bidding decisions in a simultaneous auction where all BTA service areas may be bid upon at the same time. *See* Comments of Association at 37 (if Commission selects filing approach based on defined geographic areas, Commission should "permit simultaneous multi-round bidding . . . that permits an applicant to bid for licenses for adjacent geographic markets that may be interdependent.").

104. We must, given the sources noted above from which interdependence may arise, disagree with those commenters who indicate that there is little or no interdependence between MDS channels and who oppose simultaneous multiple round bidding on that basis. *See* Comments of American Telecasting at 26; Heartland at 8-9; Vega at 17. Indeed, we note that some commenters acknowledge that their opposition to simultaneous bidding is based, not on firm evidence that BTA authorizations lack interdependence, but rather on their preference for a national filing window approach to MDS licensing.[70] However, because we are adopting a filing approach based on predetermined geographic areas, the authorizations for adjacent BTA service areas will, as discussed above, be interdependent. *See* Comments of Association at 37; PacTel at 3. While it may be difficult to determine the exact degree of interdependence between the BTA authorizations to be auctioned, as evidenced by the disagreement among the commenters,[71] we believe, for the reasons stated previously, that there is some interdependence between them and that simultaneous multiple round bidding will allow bidders to best take account of such interdependencies. Because the Commission has gained substantial experience with simultaneous bidding, which has declined significantly in cost, we conclude that simultaneous multiple round bidding is appropriate for MDS, as this bidding method will most efficiently award authorizations for those service areas (particularly contiguous BTAs) which are interdependent. *See Second Report and Order* at 2363-2364.

105. In addition to issues of cost and interdependence, other considerations support the use of simultaneous multiple round bidding for MDS. Compared with other bidding mechanisms, including open outcry and sealed bidding, simultaneous multiple round bidding

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[70] *See* Comments of Vega at 17 (since we support national filing window, an interdependence issue is virtually eliminated); Association at 43 (under national filing window approach, simultaneous multiple round auctions are unnecessary since there will be little interdependence between different licenses).

[71] *See, e.g.*, Comments of PacTel at 3 ("there may be some significant interdependence . . . in contiguous markets"); Comments of CAI Wireless at 9 ("interdependence between geographical areas . . . will vary widely"); Comments of ACS Enterprises, *et al.* at 18 ("MDS channels to be auctioned would not have a high degree of interdependence").

will generate the most information about the value of BTA service areas during the course of the auction. Thus, it is the most likely auction method to award BTA authorizations to the bidders who value them most highly. *See* Comments of PacTel at 3 (simultaneous multiple round bidding provides bidders with equal information and allows bidding to continue until highest value bidder is identified). We also note that an auction method awarding BTA authorizations to the parties who value them most highly should result in the award of authorizations to *bona fide* wireless cable operators, rather than to speculators, because *bona fide* operators will likely value authorizations more highly than, and will therefore outbid, speculators, who may be reluctant to pay up front the amounts necessary to obtain authorizations through competitive bidding.[72] Moreover, given the uncertainty as to the value of the MDS spectrum,[73] the information generated by simultaneous multiple round bidding should prove particularly valuable by giving bidders more flexibility to pursue back-up strategies.[74] Because of the superior information and flexibility it provides, this auction method should also yield more revenue for the MDS spectrum than other auction designs, including open outcry.[75] Although the raising of revenue is not our dominant concern, we note that Congress directed the Commission, in designing auction methodologies, to promote "recovery for the public of a portion of the value of the public spectrum resource."

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[72] Sealed bidding is not generally favored by commenters expressing any opinion on auction design, and is not supported by the Commission for MDS, because this bidding method will generate no information about the value of the BTA service areas during the course of an auction, and thus may not award BTA authorizations to the parties who value them the most. *See Second Report and Order* at 2362; Comments of Association at 43-44; Heartland at 9-10; ACS Enterprises, *et al.* at 18-19. The only commenter recommending sealed bidding presents no substantive arguments to support its position and fails to address the drawbacks inherent in an auction method that provides no information about spectrum value to bidders. *See* Comments of Mitchell at 4.

[73] *See* Comments of Association at 43-44; ACS Enterprises, *et al.* at 18-19.

[74] Commenters recognize the importance of selecting an auction design allowing bidders to pursue back-up strategies. *See* Comments of Association at 44 (opposing sealed bidding because it provides no opportunity to pursue back-up strategies).

[75] A simultaneous auction for MDS will tend to raise more revenue than a sequential oral auction for two reasons. First, it will increase the value of the BTA service areas by facilitating efficient aggregation. Second, because it will provide more information about the value of the BTA service areas, it will reduce the propensity of sophisticated bidders to bid cautiously to avoid the "winner's curse"-- the tendency for the winner to be the bidder who most overestimates the value of the item up for bid.

47 U.S.C. § 309(j)(3)(C).[76] Finally, the employment of simultaneous multiple round bidding for MDS, rather than open outcry, will eliminate the need for the Commission to select the order in which the BTA service areas will be auctioned. *See Second Report and Order* at 2360, 2363, 2366.

106. We conclude that these numerous advantages for MDS of simultaneous multiple round bidding outweigh any remaining disadvantages cited by some commenters. In addition to the objections, as described above, offered against simultaneous bidding based on the assumed high cost and administrative burden for the Commission and the perceived lack of interdependence, some commenters also assert that simultaneous multiple round bidding is complex and expensive for bidders and favor open outcry auctions in part because of their perceived simplicity and relatively low cost for bidders. *See* Comments of Vega at 18; ACS Enterprises, *et al.* at 17. *See also* Comments of Association at 43 (supporting open outcry as less expensive bidding method if national filing window approach is selected).

107. The simultaneous multiple round auction design adopted herein includes several features that should allay the concerns expressed by these commenters as to the perceived burdensome nature of simultaneous bidding. We expect, for example, to have bidding rounds of shorter duration than in other simultaneous multiple round auctions, such as broadband PCS. This measure should shorten the MDS auction substantially so that the length of the auction should not prove burdensome to bidders. In addition, the burden on bidders will be reduced by the variety of methods through which they may participate in the MDS simultaneous multiple round auction. Bidders will be able to submit bids on site, via personal computers using remote bidding software, or via telephone;[77] however, given the space limitations for on site bidding and the uncertainty as to the exact number of prospective bidders, the Commission reserves the right to have only remote bidding -- by personal computer and by telephone -- for the MDS auction. Thus, the expense to the bidders of participating in a simultaneous multiple round auction should be less than in an open outcry auction, where bidders (and/or their representative(s)) would need to travel to and remain in

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[76] We agree with commenters to the extent they suggest that the Commission's primary mandate is not to adopt an application procedure and auction design that maximize revenue. *See* Reply Comments of CAI Wireless at 6-7; Comments of Association at 29-30; Comments of American Telecasting at 4-5. Given the clear language of Section 309(j)(3)(C), we do, however, believe that the Commission has a duty to consider the recovery of the value of the MDS spectrum as a factor in its adoption of an appropriate MDS auction design.

[77] Telephonic bidding should, in particular, be a simple and inexpensive method for bidders to submit bids. If submitting bids by telephone, bidders may utilize the Internet to learn of the round-by-round results of the auction; on-line services such as Compuserve provide Internet access at low cost. Bidders may also, at negligible cost, utilize a bulletin board service, accessible by long distance telephone, from which auction results can be downloaded to a personal computer.

Washington, D.C. for the duration of the auction. Finally, the Commission will hold a seminar for prospective bidders to acquaint them with this bidding design and all alternative bid submission methods.

108. Given the numerous advantages of the generally preferred auction method of simultaneous multiple round bidding, we believe that this methodology will best serve for conducting MDS auctions. We note, however, that the presence of incumbents in the BTA service areas could affect the relative desirability and value of BTA authorizations in ways we do not anticipate. In the event that the filings of short-form applications indicate that the BTA authorizations have relatively little interdependence and lower than expected value, we delegate authority to the Mass Media Bureau and the Wireless Telecommunications Bureau to reconsider the issue of whether another auction design would be more appropriate.

c. MDS Bidding Procedures

109. There will be one authorization offered in each BTA and the BTA authorizations will be awarded by simultaneous multiple round bidding. All BTA service areas will be auctioned at the same time. Bids will be accepted at the same time on all BTA service areas in each round of the auction. High bid amounts will be posted after the end of the bid submission period in each round of bidding. With modifications to take account of the unique characteristics of MDS and to reduce length, MDS auctions will follow the general bidding procedures we have used to date to conduct the narrowband and broadband PCS auctions.

110. ***Bid Increments***. In using simultaneous multiple round bidding to award the BTA authorizations, it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous stopping rule. In that case, all markets will remain open until there is no bidding on any market, and a delay in closing the bidding on one market will delay the closing of all markets. *Second Report and Order* at 2369.

111. Because we plan to use simultaneous multiple round bidding with a simultaneous stopping rule to award BTA authorizations, we believe that it is necessary to impose a minimum bid increment to ensure that the MDS auction concludes within a reasonable period of time. As we recognized in the *Second Report and Order*, it is important to establish the amount of the minimum bid increment as the greater of a percentage and fixed dollar amount. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. *Id.* at 2369. Accordingly, we will impose a minimum bid increment of some percentage of the high bid from the previous round or a fixed dollar amount, whichever is greater, in MDS auctions where simultaneous multiple round bidding is

used. We will announce by public notice prior to the MDS auction the specific bid increment that generally will be utilized.

112. The Commission will also retain the flexibility to vary the minimum bid increment during the course of the MDS auction by announcement. We may, for example, begin the MDS auction with a sizable minimum bid increment and reduce the bid increment as the auction progresses. Starting with a sizable minimum bid increment will move the auction quickly at the beginning, when prices have limited informational content and there is little benefit to either bidders or the Commission of refined price movements, while allowing bidders to express small differences in valuation as the auction nears a close, increasing both efficiency and auction revenues. Small bid increments also reduce the chances of ties. Where a tie occurs, the high bidder will be determined by the order in which the bids were received by the Commission. *See Second Report and Order* at 2369. Adjustments in the bid increment may be based in part on the level of bidding activity.

113. ***Duration of Bidding Rounds.*** To gain the full benefit of the information generated by a simultaneous multiple round auction, bidders will need some time between bidding rounds to evaluate back-up strategies and consult with their principals. Prior to the MDS auction, we will announce by public notice the duration of bidding rounds for the auction. We also reserve the discretion during the course of the auction to vary, by public notice or announcement, the duration of bidding rounds or the interval at which bids are accepted. We expect to allow more time for the initial rounds in the MDS auction, while bidders familiarize themselves with the bidding process, and then increase the frequency of rounds as the auction progresses. Thus, we should be able to move the auction toward closure in a reasonable period of time.[78]

114. ***Activity Rule.*** To ensure that a simultaneous MDS auction with a simultaneous stopping rule closes within a reasonable period of time and to increase the information conveyed by bid prices during the auction, we believe that it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all markets open for bidding as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid. As noted in the *Second Report and Order*, this could lead to very long auctions. *See id.* at 2371. Delaying serious bidding until late in an auction also reduces the information content of prices during the course of the auction. Without an activity rule, bidders cannot know whether a low level of bidding on a particular market means that the market's price is near its final level or if instead many serious bidders are holding back and may bid up the price later in the auction. When bidding closes on a

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[78] Given our estimates of the value of the BTA service areas and the likely number of bidders, we expect to hold more frequent bidding rounds in the MDS auction than we have in certain other simultaneous multiple round auctions, particularly broadband PCS. *See Second Report and Order* at 2368.

market-by-market basis, an activity rule in less important. This is because failure to bid on a given market in any round may result in loss of the opportunity to bid on that market, if that round turns out to be the last one for that market.

115. In the *Second Report and Order*, we adopted the three-stage Milgrom-Wilson activity rule as our preferred activity rule when a simultaneous stopping rule is used. *Id.* at 2372. *See also Fifth Report and Order* at 5553-5556. We plan to employ this activity rule in the MDS auction as well. Under the Milgrom-Wilson activity rule, bidders are required to declare their maximum eligibility in advance of the auction and make an upfront payment proportional to that eligibility level. In the PCS auctions, activity and eligibility are defined in terms of "MHz-pops." *See, e.g., Fifth Report and Order* at 5553-5554. Specifically, the number of MHz-pops associated with a PCS license is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We chose MHz-pops because we anticipated that PCS license values would be closely related to the number of MHz-pops in the license service areas. This choice ensures that the measure of bidding activity used in the activity rule is highly correlated with license values. In the MDS auction, bidding activity and eligibility will be defined in terms of dollar values. The Commission will assign an "activity unit" value to each BTA service area for the purpose of measuring bidding activity and eligibility. Specifically, the activity unit value for a BTA service area will be equal to the upfront payment associated with that BTA service area. A bidder's maximum eligibility (which is also the bidder's eligibility for the first round of the auction) will be equal to its total upfront payments.[79] Because the upfront payments will be related to the value of the BTA service areas (*see infra* ¶ 136), activity units will fulfill the same function that MHz-pops have fulfilled in the previous PCS auctions.

116. The Milgrom-Wilson activity rule provides that a bidder's minimum activity level, measured as a fraction of eligibility in the current round, will increase during the auction. A bidder will be considered "active" on a BTA service area in the current round if it is either the high bidder at the end of the bid withdrawal period in the previous round, or if it submits a bid in the current round which meets or exceeds the minimum valid bid (*i.e.*, a bid that exceeds the high bid in the previous round by at least the minimum bid increment). A bidder's activity level in a round is the sum of the activity units associated with the BTA service areas on which the bidder is active.

117. The minimum required bidding activity levels for each stage of the MDS auction are as follows. In each round of Stage One of the auction, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least fifty percent of the activity units for which it is currently eligible. Failure to maintain

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[79] As explained in ¶ 138, however, a small business bidder eligible for a reduction in its upfront payment requirement will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.

the requisite activity level will result in a reduction in the amount of activity units associated with BTAs upon which a bidder will be eligible to be active in the next round of bidding (unless an activity rule waiver, as described below, is used). During the first stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2/1). Eligibility for each applicant in the first round of Stage One is determined by the amount of the upfront payment received and the BTAs identified in the applicant's short-form application. In each round of Stage Two, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing at least eighty percent of the activity units for which it is eligible in that particular round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4). In each round of Stage Three, a bidder who wishes to maintain its current eligibility is required to be active on BTA service areas encompassing ninety-five percent of the activity units for which it is eligible in that particular round. In the final stage, if activity in the current round is below ninety-five percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths (20/19).

118. In the PCS auctions, we specified transition guidelines for deciding when the auction would move from Stage One to Stage Two to Stage Three. Those guidelines are based on the "auction activity level," the sum of the MHz-pops of PCS licenses for which the high bid increased in the current round as a percentage of the total MHz-pops of all licenses offered in the auction. *See, e.g., Fifth Report and Order* at 5555. However, we also retained the discretion to move the PCS auctions from one stage to another at a rate different from that set out in the guidelines. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6860 (1994).

119. For the MDS auction, we shall employ an analogous procedure. The "auction activity level" for a given round of the MDS auction will be defined as the sum of the activity units associated with the BTA service areas for which the high bid increases in that round, divided by the sum of activity units associated with all of the BTAs being auctioned. The following transition guidelines apply. The MDS auction will begin in Stage One and move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. The Commission retains the discretion to determine and announce during the course of an MDS auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of BTA service areas on which there are new bids, the percentage of activity units on which there are new bids, the number of new bids, and the percentage increase in revenue.

120. To avoid the consequences of clerical errors and to compensate for unusual

circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. We believe that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control. *See Second Report and Order* at 2372.

121. In MDS auctions, bidders will be provided five activity rule waivers that may be used in any round during the course of the auction. *See Second Report and Order* at 2373. If a bidder's activity level is below the required activity level, a waiver will automatically be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round. An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994). If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified in ¶ 117), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of pro-actively entering an activity rule waiver during the bid submission period.[80] If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

122. The Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also retain the flexibility to adjust prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction. *See Second Report and Order* at 2373. We will announce by public notice before the MDS auction the number of waivers that will be allowed in that particular auction.

123. As with other auctions, we reserve the right to impose for the MDS auction an activity rule less complex than the Milgrom-Wilson rule. *See Second Report and Order* at 2372; *Fifth Report and Order* at 5556. We will announce by public notice before the MDS auction the activity rule that will be employed in that particular auction.

124. ***Stopping Rules.*** We noted in the *Second Report and Order* that, with multiple round auctions, a stopping rule must be established for determining when the auction is over.

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[80] Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

Id. at 2369. In an MDS simultaneous multiple round auction, bidding could close separately on individual BTA service areas, simultaneously on all BTA service areas, or a hybrid approach could be used. Under an individual approach, bidding would close on each BTA service area after one round passed in which no new acceptable bids were submitted for that particular service area. With a simultaneous stopping rule, bidding would remain open on all BTA service areas until there was no new acceptable bid on any service area. This approach would have the advantage of providing bidders full flexibility to bid for any BTA service area as more information became available during the course of the MDS auction, but it could lead to a very long auction, unless an activity rule were imposed. *See id.* at 2370. A hybrid approach would combine the individual and the simultaneous approaches.[81]

125. For MDS auctions, we intend to utilize a simultaneous stopping rule, as we have successfully used in previous simultaneous multiple round auctions. Bidding will accordingly remain open on all BTA service areas until bidding stops on every BTA service area. The auction will close after one round passes in which no new valid bids or proactive waivers are submitted. The Commission retains the discretion, however, to keep the MDS auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive waiver.[82] Since we are also imposing an activity rule (as discussed above), we believe allowing simultaneous closing for all BTA service areas will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will refrain from bidding until the final rounds. We also believe that a simultaneous stopping rule will best enable bidders to take account of any interdependencies that exist between BTA authorizations (especially authorizations for adjacent areas) and will allow bidders to make the most informed bidding decisions. Thus, simultaneously closing bidding on BTA service areas will most likely award licenses to the bidders who value them most highly. *See Second Report and Order* at 2370.

126. Additionally, the Commission may also declare at any time after forty rounds that the MDS auction will end after a specified number of additional rounds. If the Commission invokes this stopping rule, it will accept bids in the final round(s) only for BTA service areas on which the high bid increased in at least one of the preceding three rounds.

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[81] For example, in a hybrid approach, we could use a simultaneous stopping rule (along with an activity rule designed to expedite closure) for higher valued BTA service areas. For lower valued BTA service areas, where the loss from eliminating some back-up strategies would be less, bidding on BTAs could be allowed to close individually. *See Second Report and Order* at 2370.

[82] This will help ensure that the MDS auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. *See Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7685 (1994).

See Second Report and Order at 2370 n.106. Stopping the MDS auction after a specified number of additional rounds will ensure ultimate Commission control over the duration of the auction. *See id.* at 2370. Thus, the Commission will have the means to prevent bidders from continuing to bid on a few BTA service areas (or even a single service area) solely to delay the closing of bidding for all BTA service areas in an MDS auction with a simultaneous stopping rule. This will also ensure that the Commission can end the MDS auction if it determines that the benefits from ending the auction, and hence granting BTA authorizations more rapidly, exceed the possible efficiency loss from cutting off bidding on a few BTA service areas. If we exercise this option, we favor the use of three final rounds. Allowing more than one additional round provides some opportunity for counter-offers, thus reducing the risk that a BTA authorization will not be awarded to the party that values it most highly.

127. If this fail-safe mechanism is used in an MDS auction, there are two reasons not to take bids on BTA service areas on which there has been no recent bidding. First, the fact that bidding on an individual BTA service area may close will provide an additional incentive to bid actively and thus speed the conclusion of the MDS auction. If bids are accepted on all BTA service areas in the final round(s) there is less risk to a bidder in holding back. Second, closing bidding on BTA service areas for which activity has ceased ensures high bidders for those service areas that they will not lose a BTA authorization without having an opportunity to make a counter-offer.[83] This reduces the uncertainty associated with aggregating BTA authorizations (such as those for adjacent BTAs) that may be worth more as a group than individually. If final bids are accepted on all BTA service areas, a high bidder on an aggregation of BTA service areas may unexpectedly lose a significant part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

128. The Commission does not intend to exercise this option except in extreme circumstances, such as where the MDS auction is proceeding very slowly, there is minimal overall bidding activity, and it appears unlikely that the auction will close within a reasonable period of time. Before exercising this option, however, the Commission would first attempt to increase the pace of the auction by announcing that the auction will move into the next stage, where bidders would be required to maintain a higher level of bidding activity. Under these circumstances, the Commission may also first increase the number of bidding rounds per day and increase the amount of the minimum bid increments for those limited number of BTA service areas where there is still a high level of bidding activity.

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[83] Either the MDS auction will close only when bidding ceases on all BTA service areas, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on BTA service areas on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

129. Additionally, because of the large number of BTA service areas to be auctioned at once, we will retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these service areas if, as we gain more experience with auctions, we determine that simultaneous stopping rules are too complex to implement for very large numbers of service areas. The specific stopping rule for ending bidding on the BTA service areas will be announced by public notice prior to the MDS auction.

5. Procedural and Payment Issues

a. Pre-Auction Application Procedures

130. The *Second Report and Order* established general rules and procedures for participating in auctions. Again, however, we noted that these might be modified on a service-specific basis. As described below, we have determined that we will follow for new MDS initial applications the procedural and payment rules established in the *Second Report and Order* and set forth at 47 C.F.R. Chapter I, Part 1, Subpart Q, with modifications to fit MDS. Certain procedural details will be supplied later by public notices. Our objective has been to design rules and procedures that will reduce administrative burdens and costs on bidders and the Commission, ensure that bidders and licensees are qualified and able to construct their systems, and minimize the potential for delay of service to the public. *See* 47 U.S.C. § 309(j)(3)(A) (in designing auction rules, Commission should seek to promote development and rapid deployment of products and services for public benefit, without administrative or judicial delays).

131. Before an MDS auction, the Commission, or, pursuant to delegated authority, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will release public notices concerning the auction. The public notices will specify the BTA service areas to be auctioned, the filing deadline for short-form applications, and the time, place, and method of competitive bidding to be used, as well as applicable bid submission and payment procedures.

132. Applicants will be required to submit short-form applications by the date specified by public notice. Applicants should file a short-form application identifying all BTA service areas specified by the public notice in which they are interested in bidding.[84] If the Commission receives only one application that is acceptable for filing for the same BTA service area and thus there is no mutual exclusivity,[85] the Commission will by public notice

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[84] As described in detail below, the short-form applications must also include an exhibit identifying any bidding consortia or other arrangements relating to the BTA service areas being auctioned. *See infra* ¶ 164.

[85] Absent mutually exclusive applications, the Commission is prohibited from conducting an auction. *See* 47 U.S.C. § 309(j)(1).

cancel the auction for this BTA service area and establish a date for the filing of either an initial long-form application for an MDS station license or, for a heavily encumbered BTA, a statement of intention with regard to the BTA.[86]

133. To encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications; for MDS, we classify all amendments to short-forms as major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rules set forth below. *See infra* ¶ 165. We note in particular that a change in control of an applicant or a change in the BTAs upon which an applicant wishes to bid will be regarded as a major amendment to the short-form application. In addition, applications that are not signed in any manner or form, including by electronic means, or that fail to make the requisite certifications will be dismissed and may not be resubmitted. *See Second Report and Order* at 2377; 47 C.F.R. § 1.2105(b).

134. After reviewing the short-form applications, the Commission will issue another public notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications, such as typographical errors, also will be permitted to file corrected applications. Following a review of the corrected applications, the Commission will release another public notice announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in this public notice will then be required to submit the full amount of their upfront payment. *See Second Report and Order* at 2377.

b. Upfront Payments

135. In the generic auction rules, we described five types of payments: upfront payments, down payments, final payments, bid withdrawal payments, and default and disqualification payments. Given the history of speculators filing MDS applications, we believe a substantial upfront payment is needed for MDS auctions to discourage speculative bidding and increase the likelihood of applicants who intend to provide service to the public obtaining the remaining available MDS channels. Requiring a substantial upfront payment provides some degree of assurance that only serious, qualified bidders will participate and serves as a deterrent to the filing of speculative applications, which may delay the provision of service to the public. The upfront payments will also provide the Commission with a source of funds to satisfy any bid withdrawal or default and disqualification payments

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[86] *See infra* ¶¶ 150-154, for the procedures for filing either a long-form application for a station license or a statement of intention with regard to the BTA.

assessed. *See Second Report and Order* at 2378-2379. Therefore, we will require an upfront payment for the MDS auction.[87]

136. We believe the upfront payment should bear a relation to the value of the BTA authorizations that a bidder hopes to be awarded. We accordingly delegate to the Mass Media Bureau and the Wireless Telecommunications Bureau the authority to determine an appropriate upfront payment for each BTA service area being auctioned, taking into account, at the Bureaus' discretion, such factors as the population and the approximate amount of usable spectrum in each BTA.[88] Bearing in mind the uncertainties associated with valuing the BTA authorizations, we expect that the Bureaus will follow the guidelines laid out in the *Second Report and Order* and establish upfront payments equal to around five percent of the expected amounts of winning bids for the various BTA service areas. *See id.* at 2378-2379. In no event will the upfront payment for any BTA service area be less than $2500, the minimum suggested in the *Second Report and Order*, and we retain the flexibility for the Bureaus to modify this minimum if we find that a higher amount would better deter speculative filings. *Id.* at 2379.

137. Prior to the MDS auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will publish a public notice listing the upfront payment amounts corresponding to each BTA service area to be auctioned. The number of activity units associated with a BTA service area (*see* ¶ 115) equals the amount of the upfront payment for that BTA. A prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. The combination of activity units on which a bidder is active in a round equals the sum of the activity units associated with the BTAs on which the bidder has submitted a bid, or on which the bidder is the standing high bidder. Although a bidder may file applications for every BTA service area being auctioned, the total upfront payment submitted by each applicant will determine the combinations of BTA service areas on which the applicant will actually be permitted to be active in any single round of bidding.[89]

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[87] Commenters addressing this issue agree that upfront payments should be required for MDS to deter insincere or unqualified applicants. *See* Comments of Association at 51; Vega at 17-18; ACS Enterprises, *et al.* at 20-21.

[88] *See* Comments of Association at 51 (if Commission adopts filing approach for MDS based on predetermined geographic areas, formula based on population and megahertz in each service area is appropriate for determining upfront payments).

[89] Consider, for example, an applicant that submits a $100,000 total upfront payment. As explained above at ¶ 115, the maximum number of activity units for that applicant is 100,000. In any single round, the applicant could be active on two BTA service areas with 50,000 activity units each, on five BTAs with 20,000 activity units each, on ten BTAs with 10,000 activity units each, or on any combination of BTA service areas for which the sum of

138. A prospective bidder in the MDS auction that claims status as a small business, as defined in ¶¶ 190-191, will be eligible for a twenty-five percent reduction in its upfront payment requirement. *See infra* ¶¶ 184-185 for a discussion of the reduced upfront payments measure. A small business eligible for this reduction in its upfront payment will not have the number of its activity units decreased as a result of submitting a reduced upfront payment.[90]

139. We do not believe that a very low upfront payment, as one commenter proposes, is sufficient to discourage speculative or insincere bidding. *See* Comments of Vega at 18 (recommending $500 upfront payment per every five market or channel groups). We also feel that a flat fee unrelated to the value of the individual BTA service areas, as another commenter suggests, is inappropriate. *See* ACS Enterprises, *et al.* at 20 (supporting upfront payment of $2000 per channel). Given the Commission's experience with defaults by some winning bidders in the July 1994 IVDS auction, we find that an upfront payment which reflects the value of the BTA service areas being auctioned is preferable to a low flat fee unrelated to BTA service area values. *See* Comments of Association at 52 (stating that upfront payments in excess of $2500 minimum established in *Second Report and Order* and employed in IVDS auction are needed to assure seriousness of MDS applicants and to cover defaults by winning MDS bidders).

140. Applicants identified by public notice as those whose applications have been accepted for filing will be required to submit their upfront payments to the Commission's lock-box bank by the date specified in the public notice, which generally will be no later than fourteen days before the scheduled auction. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. All payments, including upfront, down and final payments, should be accompanied by FCC Form 159 (remittance advice form). After the

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associated activity units totals 100,000 or less. As set forth above, a bidder is "active" on a BTA service area if it is either the high bidder on that BTA from the previous round (at the end of the bid withdrawal period), or if it submits a bid on that BTA in the current round which exceeds the previous round's high bid by at least the minimum bid increment. *See supra* ¶ 116. Thus, a bidder who begins the auction eligible to bid (based on the magnitude of its upfront payment) on BTA service areas associated with 100,000 activity units and who, in the first round, is the high bidder on a BTA service area associated with 50,000 activity units, may only, in the second round, submit new bids on a combination of BTAs associated with 50,000 or fewer activity units.

[90] For example, if a small business applicant is interested in bidding on a BTA with an upfront payment of $100,000, it would be required, under the reduced upfront payment measure, to submit only $75,000 to qualify to bid on that BTA. This applicant would still, however, receive 100,000 activity units -- the number of activity units equivalent to the full upfront payment amount associated with that BTA.

Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a public notice announcing the names of all applicants that have been determined to be qualified to bid in the MDS auction. Any applicant who fails to submit a sufficient upfront payment to qualify it to bid on any BTA service area being auctioned will not be identified on this public notice as a qualified bidder, will be prohibited from bidding in the MDS auction, and its application will be dismissed. *See Second Report and Order* at 2377; 47 C.F.R. § 1.2106.

141. The upfront payments submitted by prospective bidders will later be counted toward the down payments that winning bidders must make. The upfront payments of bidders who are not the high bidder on any BTA service area will be refunded as soon as possible after the MDS auction. Prior to refunding the upfront payments of non-winning bidders, however, we will determine whether they are subject to withdrawal or default payments. In some circumstances, it may be appropriate to retain upfront payments until after the winning bidders have tendered their down payments because further rounds of competitive bidding may be held if down payments are not made. No interest will be paid on upfront payments. *See Second Report and Order* at 2380.

c. Down Payments and Full Payments

142. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided generally in the *Second Report and Order* that each winning bidder must tender a down payment sufficient to bring the total deposit up to twenty percent of the winning bid. We believe a down payment requirement is appropriate for MDS.[91] Accordingly, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least twenty percent of the final payment due for the BTA authorization(s) won in the MDS auction. If the upfront payment already tendered amounts to twenty percent or more of the winning bid, no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder. To simplify this process administratively, the Commission will not honor requests that this excess amount be retained and applied toward later payments or obligations. The down payment will be due within five business days after the winning bidders have been notified by the Commission, and may be made by cashier's check or by wire transfer to the Commission's lock-box bank. The down payment will be held by the Commission until the winning bidder has been issued its BTA authorization and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a station licensee or has defaulted, in which case it will be returned, less applicable default payments. During the period that deposits are held pending ultimate award of the BTA authorization, the interest that accrues, if any, will be retained by the

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[91] Commenters addressing this issue similarly see no reason to depart from the approach established in the *Second Report and Order*. *See* Comments of Association at 52.

government. *See Second Report and Order* at 2381-2382; 47 C.F.R. § 1.2107(b).

143. Based upon our experience in conducting spectrum auctions, we will require winning bidders to make full payment of the balance of their winning bids prior to the issuance of their BTA authorizations. Specifically, the Commission will, when a BTA authorization is ready to be issued, release a public notice stating that fact. The auction winner for that BTA will be required to make full payment of the balance of its winning bid within five business days following this public notice. The Commission will issue the BTA authorization to the auction winner within ten business days following notification of receipt of full payment. *See Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995) at ¶ 109.

144. Auction winners that are small businesses eligible for installment financing will be subject to differing payment requirements, however. *See infra* ¶¶ 190-192 for discussion of small business eligibility. Specifically, a small business will be required to bring its total deposit with the Commission up to ten percent of its winning bid within five business days after having been notified by the Commission of its winning bidder status. An additional ten percent will be due within five business days following the public notice that its BTA authorization is ready to be issued. The Commission will then issue the BTA authorization to the small business within ten business days following notification of receipt of this additional ten percent payment.

d. Bid Withdrawal, Default and Disqualification Payments

145. In the *Second Report and Order*, we concluded that strong incentives are needed to ensure that potential bidders are financially and otherwise qualified to participate in auction proceedings, so as to avoid delays in the deployment of new services to the public. *Id.* at 2382. We accordingly stated that we will, in simultaneous multiple round auctions, impose a bid withdrawal payment requirement in instances where a high bid is withdrawn during the course of the auction and an additional default payment if a winning bid is withdrawn after the auction has closed. *Id.* at 2373-2374.

146. In an MDS simultaneous multiple round auction, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the BTA service area is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.[92] No withdrawal payment

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[92] If a BTA service area is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the service area is re-offered. If a BTA service area is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder

will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to submit a long-form application or statement of intention, fails to make full payment, or is otherwise disqualified) will be subject to an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. *See* 47 C.F.R. §§ 1.2104(g) and 1.2109; *Second Report and Order* at 2373-2374. The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of these amounts. In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision. We believe that these payment requirements will discourage insincere bidding and default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.[93]

147. In addition, "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant." *Second Report and Order* at 2383. Parties who obtain their BTA authorizations through the auction process are put on notice that if their BTA authorizations are cancelled for any reason they will lose all monies paid to the Commission regarding those authorizations. This loss of monies paid is not intended as an exclusive remedy. Where such BTA holder's conduct so warrants, additional sanctions, including monetary fines and station license revocation, may be imposed.

148. In the event that an MDS auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the BTA service area to the second-highest bidder. As we stated in the *Second Report and Order*, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the

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will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the BTA service area is offered by the Commission. If a BTA service area which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders will not be required to accept the offer. We wish to encourage losing bidders in MDS simultaneous multiple round auctions to bid on other BTA service areas, and therefore we will not hold them to their losing bids on a service area for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[93] Commenters addressing this issue agree that default payments are needed to deter speculation and insincere bidding. *See* Comments of Association at 54; PacTel at 4-5.

BTA service area. *Id.* at 2383. Although we recognize that this may cause a brief delay in the initiation of service to the public, circumstances may change so significantly during the time between the original auction and the disqualification as to alter the value of the BTA service area to auction participants, as well as to parties who did not participate. In this situation, awarding BTA authorizations to the parties that value them most highly can best be assured through a re-auction. If, however, the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the BTA service area to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the BTA service area to other bidders (in descending order of their bid amount) at the final bid levels. Moreover, if only a small number of relatively low value BTA service areas are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the BTA service areas to the highest losing bidders because the cost of holding another auction for MDS may not exceed the benefits. *See id.*; 47 C.F.R. § 1.2109(b) and (c).

149. If a new MDS auction becomes necessary because of default or disqualification more than five business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will facilitate achieving this goal, and that the short delay that may result from allowing new applications in a re-auction is warranted. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the BTA authorizations, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource. *See Second Report and Order* at 2384; 47 C.F.R. § 1.2109(c).

e. Post-Auction Application Procedures

150. Unlike other services where auction winners may file a single long-form application to obtain a single license for the entire geographic area auctioned, the winning bidder for each BTA service area will be required, in accordance with our existing rules, to submit separate long-form applications for each channel group and location within the BTA for which the bidder wants to obtain an MDS station license. The winning bidder for each BTA service area will therefore be required to submit a separate long-form application for each Channel E group, for each Channel F group, and for each Channel 1, 2 (or 2A), H1, H2, and H3 within the BTA for which the winning bidder wishes to receive a license.

151. The long-form application for the initial MDS station license within each BTA service area will be due from the winning bidder for that BTA within thirty business days

after such bidder has been notified of its winning bidder status.[94] After the Commission receives the winning bidder's down payment and the long-form application for the initial MDS station license within the BTA, we will review the long-form application, which must include, among other items, a FCC Form 430 and exhibits concerning the winning bidder's involvement in bidding consortia and status as a designated entity.[95] If the long-form application is found to be acceptable, the Commission will release a public notice announcing this fact, triggering the thirty day filing window for petitions to deny. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, the BTA authorization will be issued and the initial conditional MDS station license within the BTA service area of the auction winner will be granted, assuming that the auction winner (except for a small business making installment payments) has made full payment as set forth in ¶ 143. *See Second Report and Order* at 2383; 47 C.F.R. §§ 1.2107(c), 1.2108. Subsequent long-form applications for MDS station licenses within BTA service areas, which auction winners may submit at any time during the five year build-out period, will be reviewed by the Commission and granted in a similar manner, except, of course, that the winning bidders will need to make no further payments.

152. However, we realize that a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities. The winning bidder's objective in bidding on such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within the BTA and to maintain full flexibility to make modifications. It also seems likely that a winning bidder for a heavily encumbered BTA may itself possess most or all of the previously authorized or proposed MDS stations within that BTA, and the bidder's goal in obtaining the authorization for the BTA in which it already had MDS stations would similarly be to preserve full flexibility to make modifications. The winning bidder for a BTA service area so heavily encumbered that it believes it cannot file an acceptable long-form application proposing an MDS station with average transmitted power within its BTA should follow the post-auction

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[94] We realize that other services have generally required the filing of long-form applications within ten days of notification of the winning bidders. However, given the need for MDS auction winners to protect all previously authorized or proposed MDS and ITFS facilities within their BTA service areas from harmful interference, we believe that such winning bidders will likely require a longer period of time to complete the requisite engineering studies and interference analyses before filing their initial long-form applications for MDS station licenses.

[95] The content of these exhibits is set forth in Section 21.956(b) of our amended rules, attached as Appendix C. Commenters agree that such information is needed, particularly where an applicant claims status as a designated entity. *See* Comments of U.S. Wireless at 13.

procedures set forth below.

153. After notification of its status as a winning bidder for a heavily encumbered BTA service area, the bidder must make its down payment within five business days in the normal manner. Within thirty business days after notification of its winning bidder status, the winning bidder must file with the Commission, in lieu of a long-form application for an MDS station license, a statement of intention with regard to the BTA service area, showing the encumbered nature of the BTA, identifying the incumbents, and describing in detail its plan for obtaining the previously authorized or proposed MDS stations within the BTA. We do not intend to force winning bidders to file long-form applications for MDS station licenses in BTAs so encumbered that the only proposed station to not cause harmful interference to incumbents would, for example, be a facility with a one watt transmitter and a highly directional antenna, serving no significant population. Winning bidders must, however, document in their statements of intention that additional MDS stations with average transmitted power could not be constructed in their BTAs without causing harmful interference to previously authorized or proposed MDS and ITFS facilities. If a winning bidder fails to file either this statement of intention or a long-form application within the thirty day period, it will be in default and will be subject to the appropriate default payments. The statement of intention should also include a FCC Form 430, a drug certification, and the same exhibits concerning the winning bidder's financial circumstances, involvement in bidding consortia, and status as a designated entity that must be attached to initial long-form applications. *See supra* ¶ 151.

154. The Commission will, following its review of the winning bidder's statement of intention, issue the BTA authorization to the winning bidder. Such issuance of the BTA authorization will, of course, be made only following full payment by the winning bidder as set forth in ¶ 143, except for a small business making installment payments. Parties wishing to comment on or oppose the issuance of a BTA authorization issued in connection with the filing of a statement of intention by a winning bidder must do so prior to the Commission's issuance of the BTA authorization.

f. Period of MDS Station Licenses

155. Under the Commission's rules, licenses for MDS stations are to be "issued for a period not to exceed 10 years." 47 C.F.R. § 21.45(a). "Unless otherwise specified by the Commission," the expiration of MDS station licenses as a class is, however, set on a single date (May 1) "in the year of expiration" (*i.e.*, the year which is ten years from the last expiration date of the class of MDS licenses, which was 1991). *Id.* Thus, the current term for all MDS station licenses as a class will expire on May 1, 2001, regardless of when these licenses are awarded. Because MDS station licenses as a class are due to expire on this set date, an MDS licensee who receives its station license on, for example, May 1, 1996 would in effect have the license for only five years before the licensee must apply for renewal.

156. For the reasons set forth herein, we believe that MDS auction winners should

not be subject to the fixed MDS station license renewal cycle which, under existing rules, will expire on May 1, 2001, only five years or so from the time that any auction winner could expect to receive its initial station license in its BTA service area. We believe all winning bidders in the MDS auction should be assured of receiving station licenses of a duration sufficient so that they may have a reasonable period of time to construct their systems and earn a return on the amounts they invested in acquiring the BTA authorizations and MDS station licenses by competitive bidding. In addition, we realize that bidders who must arrange financing will need to assure lenders that they will have possession of their MDS station licenses for a reasonably lengthy period of time. We therefore determine that all MDS station licenses granted in every BTA service area auctioned should be for a ten year period (the maximum specified in Section 21.45(a)) to run from the date that the Commission declares bidding in the MDS auction to be closed.

157. We conclude that awarding MDS station licenses with definite ten year terms, rather than much briefer, indeterminate terms dependent on when the license is granted, serves both prospective bidders and the Commission well. As described above, the set ten year period is of sufficient certainty and length to be fair to parties who must now pay considerable sums, and perhaps obtain outside financing, in order to acquire BTA authorizations and MDS station licenses. In addition, we note that granting MDS station licenses with set ten year terms will allow small businesses eligible for installment financing to make payments over a period comparable to the length of their initial station licenses.[96] Furthermore, specifying that MDS licenses for stations located in BTA service areas acquired by competitive bidding will be for ten year terms dated from the close of bidding in the MDS auction, rather than from the actual date of issuance of each individual station license, will be administratively convenient for the Commission. Because all MDS station licenses granted within BTA service areas acquired by competitive bidding will expire on the same date, the Commission will be able to easily process those licenses and to deal more expeditiously with their renewal. In accordance with Section 21.45(a), we hereby specify that all MDS station licenses granted in every BTA service area auctioned will have ten year terms from the date that the Commission declares bidding in the MDS auction closed.

6. Regulatory Safeguards

a. Unjust Enrichment and Anti-Trafficking Provisions

158. Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses that were obtained through competitive bidding. *See* 47 U.S.C.

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[96] *See* Comments of Association at 59 (noting that Commission's general approach of permitting installment payments to be spread over term of license would be inequitable since all MDS station licenses were set to expire on May 1, 2001, regardless of when issued, and advocating that small businesses be allowed to pay for licenses in installments over a ten year period).

§ 309(j)(4)(E). In Section 7 below, we adopt specific rules to prevent designated entities from taking advantage of special provisions for such entities by transferring control of their BTA authorizations immediately following the MDS auction. Moreover, the MDS rules already contain provisions to reduce trafficking. *See* 47 C.F.R. § 21.39 (generally prohibiting assignment or transfer of MDS conditional station licenses prior to completion of construction of facility). These existing anti-trafficking provisions will continue to apply to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. Consistent with the *Second Report and Order*, however, the existing MDS-specific anti-trafficking provisions will not apply to BTA authorizations and MDS conditional station licenses granted within auctioned BTA service areas.

159. With regard to BTA authorizations obtained by auction, an applicant seeking approval for an assignment or transfer of control of a BTA authorization within three years of receipt of such authorization by means of competitive bidding must, together with its assignment or transfer application, file with the Commission a statement indicating that its authorization was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the assignment or transfer of the authorization. We will give particular scrutiny to auction winners who have not yet begun commercial service within their BTA service areas and who seek approval for an assignment or transfer of control of their authorizations within three years after the receipt of such authorizations, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. *See Second Report and Order* at 2385-2386; 47 C.F.R. § 1.2111(a).

160. After consideration, we determine not to adopt any additional restrictions on the assignments or transfers of BTA authorizations, outside of the designated entity context. In our opinion, unjust enrichment is unlikely to be a problem in the MDS competitive bidding process where the auction winners will pay the market price for their BTA authorizations and hence resale of such authorizations should not involve any unjust enrichment. *See Second Report and Order* at 2385. Moreover, prohibitions on assignments or transfers of BTA authorizations, even if for a limited time, might have the unintended effect of delaying service to the public. *See id.* We therefore decline to impose prohibitions on assignments or transfers, such as a prohibition on the resale of MDS "channels for profit until those channels have been operational for one year," as one commenter suggests. *See* Comments of Rural Wireless at 11.

b. Construction Build-out Requirements

161. Congress has directed that the Commission, in implementing auction procedures, "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services." 47 U.S.C.

§ 309(j)(4)(B). In the *Second Report and Order*, we decided that it was generally unnecessary to impose additional construction build-out or other performance requirements for auctionable services beyond those already provided in service rules. *Id.* at 2386. However, following a review of our existing MDS rules, we determined to alter the construction requirements that will be applicable to the holders of BTA authorizations obtained by competitive bidding.

162. Our current rules require the completion of construction of MDS stations within twelve months from the date of the conditional station license grant. 47 C.F.R. § 21.43. We will continue to apply this existing requirement to MDS conditional station licenses granted prior to the institution of competitive bidding procedures. We will not, however, apply this twelve month construction requirement to MDS conditional station licenses granted in the future in the BTA service areas of auction winners. Instead, we will require the holders of BTA authorizations to meet the five year build-out requirements set forth at ¶ 43.

163. We believe that this change in our construction requirements is necessitated by our decision to grant BTA-based authorizations to MDS auction winners. Our goal in imposing any construction or other performance requirement is to insure that each auction winner provides service throughout its BTA. We believe that the imposition of a general BTA-wide build-out requirement will better achieve this goal than our continued imposition of a twelve month construction requirement on each particular MDS facility within the BTA.[97]

c. Rules Prohibiting Collusion

164. In the generic auction rules, we adopted special provisions to prevent collusive conduct in the context of competitive bidding. 47 C.F.R. § 1.2105(c). We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially larger firms, from agreeing in advance to bidding strategies that might divide the market according to their strategic interests and to the disadvantage of other bidders. Such rules could also strengthen confidence in the bidding process. *Second Report and Order* at 2386. These rules apply to all auctionable services, including MDS. Applicants are required to identify in an exhibit to their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the BTA service areas being auctioned. Applicants are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular BTA service areas on which they will

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[97] We also note that imposing such a build-out requirement is consistent with the requirements of other area-based services, such as PCS. *See* 47 C.F.R. §§ 24.103 and 24.203 (requiring building out of narrowband and broadband PCS systems to serve percentage of population, or specified amount of area, within relevant service area).

or will not bid. *See* 47 C.F.R. § 1.2105(a)(2)(viii) and (ix). Except as otherwise provided in ¶ 165, after the short-form applications are filed and prior to the time the winning bidder has made its required down payment, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing settlement agreements, with other applicants, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicants' short-form application. *See* 47 C.F.R. § 1.2105(c)(1). Communications among applicants concerning matters unrelated to the MDS auction will, however, be permitted after the filing of short-form applications. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6869 (1994).

165. Despite the restrictions set forth in ¶ 164, applicants may amend their short-form applications to reflect formation of bidding consortia or changes in ownership after the short-form application filing deadline has passed, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied to bid on the same BTA service areas. In addition, after the filing of short-form applications, applicants may make agreements to bid jointly for BTA service areas, provided the parties to the agreement have not applied for the same BTA service areas. A holder of a non-controlling attributable interest in an entity submitting a short-form application may also, following the filing of the short-form application and under certain conditions specified in 47 C.F.R. § 1.2105(c)(4), acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for the same BTA service areas. To reflect these changes in ownership or in the membership of consortia or joint bidding arrangements, applicants must amend their short-form applications by submitting a revised short-form, filed within two business days of any such change; such modifications will not be considered major amendments of the applications. However, any amendment which results in the change of control of an applicant will be considered a major amendment of the short-form. *See supra* ¶ 133; 47 C.F.R. § 1.2105(c)(2), (3) and (4); *Second Memorandum Opinion and Order* at 7254; *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7688-7689 (1994). Finally, the winning bidder for each BTA service area must, as an exhibit to its initial long-form application or statement of intention, explain the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement it had entered into relating to the competitive bidding process prior to the time bidding was completed. *See* 47 C.F.R. § 1.2107(d).

166. Where specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their upfront payment, down payment or their full bid amount, cancellation of their BTA authorizations, and may be prohibited from participating in future auctions. *See Second Report and Order* at 2388; 47 C.F.R. § 1.2109(d).

7. Treatment of Designated Entities

a. General Considerations

167. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B); 47 C.F.R. § 1.2110. Section 309(j)(4)(A) further provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments. 47 U.S.C. § 309(j)(4)(A).

168. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women. H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993) (House Report). The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." *Id.* More specifically, the House Committee was concerned that the adoption of competitive bidding should not have the effect of "excluding small businesses from the Commission's licensing procedures," and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become Commission licensees." *Id.* at 255.

169. Consistent with Congress' concern that auctions not operate to exclude small businesses, the provisions relating to installment payments in Section 309(j) were clearly intended to assist small businesses. The House Report states that these provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women." *Id.* at 255. It also states that the provisions in Section 309(j)(4)(A) pertaining to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not

inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." *Id.*

170. Moreover, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit." Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 986, 1007 (1992). As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns." *Id.* at § 331(b)(2) & (3).

171. In our initial implementation of Section 309(j), the Commission established in the *Second Report and Order* eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by minorities and women. We also identified several measures, including installment payments, bidding credits and spectrum set-asides, that we could choose from in formulating the rules for auctionable spectrum-based services. In addition, we established rules to prevent unjust enrichment by designated entities seeking to assign or transfer licenses obtained through use of one of these special measures. *See Second Report and Order* at 2388-2400.

172. In adopting provisions to provide designated entities opportunities in MDS, we note that, while Section 309(j) lists the various designated entities together, the statute does not indicate that each group must be afforded the same type of treatment. *See Competitive Bidding Notice* at 7646. We have consistently emphasized that the provisions applicable to particular designated entities would vary depending on the nature of each individual service. In particular, we have evaluated the capital requirements, the nature of the expected pool of bidders, and other characteristics of each service to determine the appropriate measures to achieve the objectives of the auction statute. *See Second Memorandum Opinion and Order* at 7256; *Fourth Report and Order* at 2336.

173. With regard to MDS, we note that this service differs from the other services that have been auctioned to date in several important ways. First, unlike PCS and IVDS, wireless cable is a heavily encumbered service with many of the channels in most major markets already occupied. Given the limited amount of remaining usable spectrum and the need to protect incumbents from harmful interference, we anticipate that the BTA service areas will be auctioned for relatively modest amounts, particularly in comparison to the sums bid in the PCS auctions. Second, it is necessary for MDS channels within a geographic area to be aggregated under the control of a single wireless cable operator, to allow it to compete with wired cable television systems in the same area. *Notice* at 7667. Thus, our goal in this proceeding is not to set the stage for the development of an entirely new industry, such as PCS, but to allow the progression and rationalization of the existing wireless cable industry. Accordingly, we cannot adopt designated entity rules that would hinder the accumulation of MDS channels within BTAs by entities financially capable of operating wireless cable

systems and providing competitive service to the public.

174. Because MDS differs from other auctionable services, we requested in our *Notice* comment on the various special measures available for designated entities. We specifically requested comment on "which entities should be eligible to receive them, and their appropriateness in light of the characteristics of MDS." *Notice* at 7678-7679. Despite our specific request for comment, no minority or women-owned entities, or organizations representing them, submitted comments on the need for special measures for such entities in MDS. Thus, the Commission has no record before it with reliable information about the percentage of minority and women-owned businesses in the wireless cable industry and no information as to how such businesses could be disadvantaged in an MDS auction without special incentives for them.

175. In this *Report and Order* we adopt specific designated entity measures appropriate for MDS, based on the record in this proceeding and on the unique characteristics of the service as identified above. Specifically, we have determined to make installment payments, reduced upfront payments and bidding credits available to small businesses, including those owned by minorities and women, and to small business consortia. We also adopt the unjust enrichment provisions set forth in the *Second Report and Order* applicable to installment payments and bidding credits. *Id.* at 2395; 47 C.F.R. § 1.2111(c) & (d). We decline to adopt spectrum set-asides. Such a measure is inappropriate for MDS, given the heavily encumbered nature of this service and the lack of sizable, discrete blocks of spectrum to auction.[98]

b. Entities Eligible for Special Measures

176. Although we will offer installment financing, reduced upfront payments and bidding credits to small businesses, we have concluded that the provision of additional measures for rural telephone companies is unnecessary in the MDS auction. Congress intended by including rural telephone companies in the category of designated entities to ensure that rural consumers received the benefit of new technologies. *See* 47 U.S.C. § 309(j)(3)(A); *Fourth Report and Order* at 2337 n.66. However, many rural consumers and residents of smaller communities already receive the benefit of wireless cable services. Numerous wireless cable operators focus on uncabled rural areas and small towns, and rural

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[98] This decision is consistent with the Commission's previous determination that, due to the small amount of spectrum available, spectrum set-asides were not appropriate for IVDS. *See Fourth Report and Order* at 2336. Such determination is also consistent with the comments received in this proceeding, which uniformly state that set-asides are not appropriate for MDS, given the limited amount of spectrum available and the need to aggregate channels to create competitive wireless cable service. *See* Comments of PacTel at 3; Vega at 19; Association at 64-66; American Telecasting at 26; ACS Enterprises, *et al.* at 24.

states, such as North and South Dakota, Oklahoma, and Nebraska, have among the highest numbers of operating and planned wireless cable systems. Moreover, given the anticipated modest auction prices of authorizations for sparsely populated rural BTAs, we do not believe that rural telephone companies will need either a special exemption from the MDS competitive bidding process or additional measures provided to them in order to compete in the auction process.[99] Rural telephone companies will, of course, be eligible for the incentives provided to small businesses generally if they meet those eligibility requirements. *See* Reply Comments of Telephone Cooperative at 2-3 (urging Commission to provide rural telephone companies same treatment as small businesses, if they meet small business eligibility requirements.) This determination not to provide additional measures for rural telephone companies is consistent with the Commission's decisions in the PCS and IVDS auction rules, and with other comments received in this proceeding.[100]

177. In addition, we expect rural telephone companies to take advantage of the partitioning option described above at ¶¶ 46-47, so they will not have to bid on entire BTAs to obtain authorizations for the rural areas they are interested in serving. Thus, rural telephone companies should be able to obtain authorizations for partitioned BTAs by private negotiation and agreement with auction winners. Rural telephone companies could also form bidding consortia to participate in MDS auctions, and then partition the BTAs won among consortia participants. In our opinion, the offering of this broad partitioning option to all interested entities, including rural telephone companies, also serves to make the provision of additional measures for rural telephone companies unnecessary.

178. Although we will offer installment financing, reduced upfront payments and bidding credits to minority and women-owned small businesses, we have also for several reasons determined, in the absence of evidence in the record to the contrary, that the provision of special measures to minority and women-owned enterprises, regardless of size, is unnecessary. First, we note that installment financing, reduced upfront payments and bidding credits will not be limited to certain BTA service areas, but will be available to small businesses for every BTA service area to be auctioned. We believe that broadening the scope of opportunity for small businesses in this manner should also create substantial

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[99] *See* Comments of Rural Wireless at 3-9 (arguing for either an exemption from competitive bidding process or additional special measures for rural telephone companies because Congress wanted to ensure the provision of wireless cable services to rural consumers and because rural telephone companies have been unable to compete in other spectrum auctions, including PCS).

[100] *See* Comments of ACS Enterprises, *et al.* at 24; Reply Comments of Association at 18; Reply Comments of American Telecasting at 16-17 (noting that additional measures for rural telephone companies are not necessary to ensure that rural consumers receive benefit of wireless cable service, and that there is no reason to prefer rural telephone companies over others as providers of such service in rural areas).

opportunity for minority and women-owned enterprises. Census data has shown that approximately ninety-nine percent of all women-owned and ninety-nine percent of all minority-owned businesses generate annual receipts of one million dollars or less.[101] Thus, we expect that virtually all minority and women-owned enterprises will be eligible for the special measures adopted herein for small businesses. Moreover, we note that we are permitting consortia of small businesses to utilize installment financing, reduced upfront payments and bidding credits, if each member of the consortia is individually eligible. Small minority and women-owned enterprises may therefore join together in consortia to participate in MDS auctions and still remain eligible for all special measures available to small businesses individually.

179. Second, we believe that small minority and women-owned entities, with the various incentives they will receive as small businesses, should be able to participate successfully in competitive bidding, given the anticipated relatively modest value of many of the BTA service areas to be auctioned. Due to the heavily encumbered nature of the wireless cable industry, the Commission has estimated that the amounts bid in the MDS auction will not approach the levels reached in earlier auctions, particularly PCS. Thus, additional incentives for minority and women-owned enterprises, regardless of their size, appear less necessary for MDS than for other auctionable services.

180. Moreover, we note that minority and women-owned entities may also, like rural telephone companies, take advantage of the broad partitioning option set forth above at ¶¶ 46-47. Unlike other services that have limited the availability of partitioning to rural telephone companies, we are allowing any type of entity to negotiate with auction winners to obtain authorizations for partitioned BTAs. Thus, minority and women-owned entities that do not wish to bid on entire BTAs should be able to acquire authorizations for partitioned portions of those service areas.

181. This determination not to provide additional measures for minority and women-owned companies, regardless of their size, is consistent with the Commission's position in other auction rules. In the *Fifth Report and Order*, we specifically observed that, due to the expected high auction value of the PCS spectrum and the substantial build-out costs, it would be necessary to provide additional assistance to women and minority enterprises to ensure their opportunity to participate in broadband PCS than would be "necessary in other, less costly spectrum-based services." *Id.* at 5572-5573. We believe that the installment financing, reduced upfront payments and bidding credits available to all small businesses, along with the broad partitioning option, should be sufficient to give minority and women-owned entities the opportunity to participate in the "less costly" MDS auction.

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[101] *See Women-Owned Businesses*, WB 87-1, 1987 Economic Census, at 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, at 81-82, Table 8.

c. Installment Payments

182. In this *Report and Order*, we approve installment financing for small businesses.[102] Permitting a winning bidder to pay through installments is the equivalent of having the government extend credit to the bidder. With this installment financing option, a prospective bidder may not need to rely as heavily on private financing either before or after an auction. Given the difficulties experienced by small businesses in obtaining credit (*see supra* ¶ 170), this governmental extension of credit should be particularly valuable to small businesses that are winning bidders in spectrum auctions. Installment payments should therefore be both an effective method of promoting the participation of designated entities in the provision of spectrum-based services and a means of distributing licenses and services among geographic areas. *Second Report and Order* at 2389-2390. In the *Second Report and Order*, we determined that installment payments should be offered only to small businesses (including those owned by minorities and women), and then only in instances where use of the spectrum being auctioned was likely to match the business objectives of *bona fide* small businesses. *Id.* at 2390. We also specifically noted that the legislative history of the Budget Act indicates that large enterprises with established revenue streams are not intended the beneficiaries of installment financing. *Id.* Given the considerable number of small enterprises currently involved in the wireless cable industry, we believe that MDS has offered, and will continue to offer, *bona fide* business opportunities to small enterprises.

183. We will therefore permit the use of installment payment plans in all MDS auctions, and follow the general procedures set forth in the *Second Report and Order*. The installment payment option will allow a small business to pay the full amount of its winning bid in installments (less the upfront payment and the down payment, half of which is due five business days after notification to the winning bidder and the other half five days after the public notice stating that the BTA authorization is ready for issuance). Only interest payments will be due for the first two years, with principal and interest both being amortized over the remaining years of the ten year period running from the date that the BTA authorization is issued. Also, interest charges will be fixed at the time of issuance of the BTA authorization at a rate equal to that of ten year U.S. Treasury notes, plus two and one half (2.5) percent. *See Second Report and Order* at 2390. Timely payments of all installments will be a condition of the issuance of the BTA authorization. Failure to make such timely payments on or before the date due is also grounds for cancellation of the BTA authorization, although limited grace periods for defaulting small businesses may be considered on a case-by-case basis. *See id.* at 2391. If a small business making installment payments seeks to assign or transfer its BTA authorization to a non-small business entity, we will require payment of any remaining unpaid principal balance, and of any unpaid interest accrued, as a condition of the assignment or transfer. *See id.* at 2395.

d. Reduced Upfront Payments

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[102] No commenter opposes the adoption of an installment payments measure.

184. Upfront payment requirements are designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal payments. *See Second Report and Order* at 2377-2379. Although the Commission has not chosen to create a general exception to our upfront payment requirements for designated entity applicants (*see id.* at 2380), we have previously allowed designated entities to make reduced upfront payments. *See, e.g., Fifth Report and Order* at 5600. We believe that allowing small businesses to make reduced upfront payments should facilitate auction participation by capital-constrained wireless cable operators and permit them to conserve resources for building out their systems after the MDS auction. *See infra* ¶ 191 for a discussion of the capital constraints faced by wireless cable operators.

185. Specifically, we will for the MDS auction reduce the upfront payment requirement by twenty-five percent for small businesses and for small business consortia. *See Fifth Report and Order* at 5600 (reducing upfront payment for bidders in entrepreneurs' block PCS auction by twenty-five percent). As discussed in ¶ 137, prior to the MDS auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will publish a public notice listing the upfront payment amount corresponding to each BTA service area to be auctioned. A prospective bidder claiming eligibility as a small business and wishing to bid on a particular BTA service area will thus be required to submit an upfront payment equal to seventy-five percent of the upfront payment specified in the public notice for that BTA. We believe that this reduction in the upfront payments for small businesses will properly permit wireless cable operators to conserve their capital for building out their systems and adding subscribers, while still serving to discourage insincere or speculative bidding.

e. Bidding Credits

186. Given the difficulties faced by small businesses in accessing capital (*see supra* ¶ 170), and based upon our expectations as to the numbers and types of bidders that will participate in the MDS auction, we conclude that a bidding credit is appropriate for small businesses in the MDS auction. A bidding credit, in effect, functions as a discount on the bid price a bidder will actually have to pay to obtain a BTA authorization and, thus, will address directly the financing obstacles encountered by small businesses. A bidding credit should accordingly "level the playing field" by helping small businesses, particularly incumbent wireless cable operators, to compete effectively in the MDS auction against larger enterprises, such as the large telecommunications carriers. We also believe the offering of a bidding credit may aid small businesses to more easily attract capital; specifically, outside investors may be more eager to invest in a small wireless cable operator if that operator will be benefited by a bidding credit in the MDS auction. For these reasons, we believe that a bidding credit will have a significant positive effect on the ability of small businesses to participate successfully in an MDS auction.

187. We note that the commenters in this proceeding differ as to the appropriateness

of a bidding credit for MDS. Some commenters support the provision of a bidding credit to help ensure that small businesses are given an opportunity to participate in the provision of spectrum-based services. *See* Comments of Vega at 19; Rural Wireless at 11-12. Other commenters either oppose the adoption of a bidding credit measure or support a bidding credit severely restricted in its applicability. *See* Comments of American Telecasting at 26; ACS Enterprises, *et al.* at 21; Association at 63-64. These commenters oppose the adoption of a widely-available bidding credit because they contend that the offering of such a credit to designated entities who may not possess MDS channels already may work against the accumulation of channels in the hands of entities with the ability to develop viable wireless cable operations. After consideration, we must disagree with those commenters who oppose the offering of a bidding credit. We believe that the adoption of a bidding credit for small businesses will not only enable small businesses generally to better compete in the MDS auction, but may also actually encourage the aggregation of channels in the hands of existing wireless cable operators by allowing these incumbents to compete successfully in the auction against larger enterprises, such as telecommunications carriers, who may not currently possess MDS channels.

188. For these reasons, we will offer a fifteen percent bidding credit to small businesses, and to consortia of small businesses, bidding on any of the BTA service areas available in the MDS auction. Given the encumbered nature of MDS and the presence of incumbents in most BTAs, it appears impractical to restrict the availability of bidding credits to certain channels or spectrum blocks. Additionally, we believe that we would provide greater opportunities for small businesses, including incumbent wireless cable operators, if we offer bidding credits on all BTA service areas. We feel that these bidding credits will help achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain BTA authorizations and to conserve scarce capital for building out their wireless cable systems after the auction. Although other services have provided larger bidding credits to certain designated entities, we believe that the fifteen percent credit is sufficient for MDS because, unlike these other services, we will offer this bidding credit on all authorizations to be awarded to small businesses.[103]

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[103] *See, e.g., Third Report and Order* at 2970 (providing twenty-five percent bidding credit on specified channels to certain designated entities in nationwide narrowband PCS auction); *Third Memorandum Opinion and Order* at 201 (providing forty percent bidding credit on specified channels to certain designated entities in regional narrowband PCS auction); *Fourth Report and Order* at 2337 (offering twenty-five percent bidding credit on one of two IVDS licenses available in each geographic license area). *See also Second Report and Order and Second Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, PP Docket No. 93-253, and GN Docket No. 93-252, FCC 95-159 (released April 17, 1995) at ¶ 130 (proposing to provide ten percent bidding credit on all 900 MHz Specialized Mobile Radio channel blocks to be auctioned).

189. To prevent unjust enrichment by small businesses trafficking in BTA authorizations acquired through the use of bidding credits, we will require small businesses to reimburse the government, as set forth below, if BTA authorizations are transferred or assigned to entities that do not fulfill the small business eligibility requirements. *See Second Report and Order* at 2395. Small businesses seeking to transfer or assign a BTA authorization to an entity not meeting the definition of small business will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before transfer or assignment will be permitted. The amount of the required reimbursement will be reduced over time. A transfer or assignment in the first two years after issuance of the authorization will result in a reimbursement of one hundred percent of the value of the bidding credit; during year three, of seventy-five percent of the bidding credit; in year four, of fifty percent; in year five, of twenty-five percent; and thereafter, no reimbursement.[104]

f. Eligibility for Installment Payments, Reduced Upfront Payments and Bidding Credits

190. In the *Second Memorandum Opinion and Order*, the Commission amended its generic auction rules to replace the small business definition used by the Small Business Administration (SBA) with a provision enabling the Commission to establish a small business definition in the context of each particular service, taking into consideration the characteristics and capital requirements of the particular service. *See* 47 C.F.R. § 1.2110(b)(1). In response to our specific request for comment on the appropriate definition of small business for MDS, the majority of commenters expressing an opinion supports the definition adopted by the Commission for the narrowband and broadband PCS. *See* Comments of Association at 61-62; Reply Comments of American Telecasting at 17-18; Reply Comments of ACS Enterprises, *et al.* at 8. Under this approach, a small business is an entity that, together with its affiliates, has annual average gross revenues for the three preceding years not in excess of $40 million.

191. Following our review of the comments and our consideration of the capital requirements of MDS, we conclude that the approach utilized by the narrowband and broadband PCS is also appropriate for MDS. We will also allow consortia of small businesses, each member of which individually meets the $40 million gross revenue standard, to qualify for installment payments, reduced upfront payments and bidding credits. *See* 47 C.F.R. § 1.2110(j). As noted by industry analysts and by commenters, wireless cable, although significantly less capital intensive than traditional coaxial cable, is not inexpensive. Tower and head end expenses may range from under $1 million for a small rural system to $2 to $3 million per system in major markets, and the cost of adding each new subscriber

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[104] Commenters addressing this issue agree with the Commission that measures to prevent unjust enrichment are needed. *See* Comments of ACS Enterprises, *et al.* at 22-23.

has been estimated to be $400 to $600.[105] Thus, even though the cost of acquiring BTA authorizations at auction are estimated to be relatively modest in comparison to other services, considerable capital is nonetheless required to construct a competitive wireless cable system. Moreover, analysts have emphasized that the wireless cable industry has historically had difficulty in obtaining financing and that the future success of wireless cable is crucially dependent upon its ability to obtain additional financing.[106]

192. Given the capital requirements of the wireless cable industry and its past difficulties in attracting capital, we believe that the $40 million gross revenue standard is appropriate for MDS.[107] If the Commission were to adopt a significantly lower standard for the definition of small business, we would exclude companies with the financial wherewithal to operate wireless cable systems competitive with cable television from eligibility for installment payments, reduced upfront payments and bidding credits. *See Second Memorandum Opinion and Order* at 7268; Comments of Association at 63. For example, if we define small businesses as entities with annual gross revenues of less than $2 million, as one commenter urges, we would prevent wireless cable companies with the financial ability to construct systems and add subscribers from obtaining the benefits of these various special measures. *See* Comments of Vega at 19. We also believe that the standard SBA definition of small business -- an entity with no more than $6 million net worth and no more than $2 million in annual profits -- is similarly overly restrictive.[108] We accordingly decline to adopt the SBA's definition of small business for MDS, as a single commenter urges. *See* Comments of Rural Wireless at 12. We therefore conclude that the $40 million gross revenue standard utilized by other services is appropriate, as it would not exclude enterprises

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[105] *See* Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 2; Dillon Read & Co. Inc., *The Wireless Cable Industry* (Aug. 22, 1994) at 10; Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry* (Jan. 21, 1993) at 4; Comments of Association at 62-63; Reply Comments of American Telecasting at 18.

[106] *See* Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry: Summary of 1994 and Outlook for 1995* (Dec. 22, 1994) at 2; Gerard Klauer Mattison & Co., Inc., *The Wireless Cable Industry* (Jan. 21, 1993) at 4.

[107] We also note, as the commenters point out, that the capital requirements for certain narrowband PCS facilities appear comparable to or even lower than the capital required to construct a viable wireless cable system. Because the Commission adopted the $40 million standard for narrowband PCS, these commenters assert that the adoption of the same standard is appropriate for MDS. *See* Comments of Association at 62; Reply Comments of American Telecasting at 18; *Third Report and Order* at 2969 n.40; *Third Memorandum Opinion and Order* at 196.

[108] *See Second Memorandum Opinion and Order* at 7268; *Third Memorandum Opinion and Order* at 195; *Fifth Report and Order* at 5606-5608.

in need of special incentives to compete successfully in the wireless cable industry, but would not provide such incentives to larger telecommunications enterprises with well-established revenue streams and easier access to capital.

g. Records Maintenance and Audits

193. All holders of BTA authorizations acquired by auction that claim designated entity status will be required to maintain, at their principal place of business or with their designated agent, an updated documentary file of ownership and revenue information necessary to establish their status. Holders of BTA authorizations or their successors in interest must maintain such files for a ten year period running from the date that their BTA authorizations are issued. The files must be made available to the Commission upon request.

194. BTA authorization holders claiming eligibility under designated entity provisions will be subject to audits by the Commission, using in-house or contract resources. Selection for an audit may be random, on information, or on the basis of other factors. Consent to such audits is part of the certification included in the short-form application. Such consent will include consent to the audit of the holders' books, documents and other material (including accounting procedures and practices), regardless of form or type, sufficient to confirm that such holders' representations are, and remain, accurate. Such consent will also include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business or keeping records regarding licensed MDS offerings, and will also include consent to the interviewing of principals, employees, customers, and suppliers of the BTA authorization holders.

195. We believe that the above records maintenance and audit provisions are necessary to prevent abuse of the special measures offered to those MDS auction winners claiming designated entity status. These provisions requiring the retention of records should not prove overly burdensome, and they will help to ensure that only entities eligible under the auction rules will be able to take advantage of the designated entity measures.

IV. ORDERING CLAUSES

196. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403, this *Report and Order* is adopted, and Part 21 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

197. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register.

198. IT IS FURTHER ORDERED that, upon approval by the Office of Management and Budget, FCC Form 304 as set forth in Appendix D will supersede FCC Form 494.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A -- LIST OF COMMENTING PARTIES

COMMENTS

1. American Telecasting, Inc. (American Telecasting)
2. CAI Wireless Systems, Inc. (CAI Wireless)
3. Caritas Telecommunications (Caritas)
4. Crowell & Moring
5. Dalager Engineering Company (Dalager)
6. du Treil, Lundin & Rackley, Inc. (du Treil)
7. Hammett & Edison, Inc. (Hammett)
8. Hardin and Associates, Inc. (Hardin)
9. Heartland Wireless Communications, Inc. (Heartland)
10. Marshall Communications, Inc. (Marshall)
11. Mitchell Communications Corp. (Mitchell)
12. The National ITFS Association (National ITFS)
13. Pacific Telesis Enhanced Services (PacTel)
14. Pepper & Corazzini, L.L.P. (Pepper)
15. The Richard L. Vega Group (Vega)
16. The Rural Wireless Cable Coalition (Rural Wireless) includes: Central Texas Wireless TV, Inc., Adams Telcom, Inc., Leaco Rural Telephone Cooperative, Inc., Delhi Telephone Company and Valley Telephone Cooperative, Inc.
17. Sioux Valley Rural Television, Inc.
18. South Carolina Educational Television Commission, State of Wisconsin-Educational Communications Board and University of Maine System (ITFS Parties)
19. United States Wireless Cable, Inc. (U.S. Wireless)
20. Vermont Wireless Cooperative (Vermont Wireless)
21. The Wireless Cable Association International, Inc. (Association)

LATE-FILED COMMENTS

1. ACS Enterprises, Inc., Baton Rouge Wireless Cable Television LLC, CableMaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Reading Wireless Cable General Partnership, Shreveport Wireless Cable Television Partnership, Superchannels of Las Vegas, Inc., Wireless Holdings, Inc. and XYZ Microwave Systems, Inc. (ACS Enterprises, *et al.*)

REPLY COMMENTS

1. ACS Enterprises, *et al.*
2. American Telecasting, Inc. (American Telecasting)
3. CAI Wireless Systems, Inc. (CAI Wireless)
4. Cross Country Wireless, Inc. (Cross Country)
5. Crowell & Moring
6. Hardin and Associates, Inc. (Hardin)
7. Humanities Instructional Television Educational Center, Inc. (Humanities)

8. Multi-Micro, Inc. (Multi-Micro)
9. National Telephone Cooperative Association (Telephone Cooperative)
10. Pepper & Corazzini, L.L.P. (Pepper)
11. The Rural Wireless Cable Coalition (Rural Wireless)
12. United States Wireless Cable, Inc. (U.S. Wireless)
13. University of Arizona
14. The Wireless Cable Association International, Inc. (Association)

LATE-FILED REPLY COMMENTS

1. Applied Video Technologies, Inc.
2. People's Choice TV Corp.
3. Region IV Education Service Center (Region IV)
4. University of Maryland
5. University of Texas

COMMENTS FILED IN RESPONSE TO JULY 28, 1993 PUBLIC NOTICE

1. American Telecasting, Inc.
2. Philip E. Atkinson
3. Amelia N. Backus
4. Leo H. Bond
5. Cardiff Broadcasting Group
6. Eileen Cassidy
7. CellTek
8. Norman Cloutier
9. Coalition of Wireless Cable Operators includes: Air Cable Television Systems, Broadcast Services International, Inc., Continental Wireless Cable Television, Inc., Family Entertainment Network, Inc., Family Entertainment Network Partnership, Green Bay Entertainment Network Partnership, MultiMedia Development Corp., People's Cable, Inc., Rapid Choice TV, Inc., Skyline Entertainment Network, Inc., Wireless Entertainment Network, Inc., and Wireless Entertainment Network Partnership
10. Robert E. Hayes
11. Margaret K. Haynes
12. Byron Homa
13. Richard P. Heuschele, M.D.
14. Arthur C. Larson
15. Lawrence Behr Associates, Inc.
16. Alfred O. Martinson
17. Mt. Pleasant Wireless
18. Multi-Micro, Inc.
19. National Telephone Cooperative Association
20. Paul M. Parks
21. Mary Patterson
22. Zigmund F. Podkowa
23. Elizabeth J. Raudio

24. Arnold Rettig
25. Sioux Valley Rural Television, Inc.
26. Carl Stark
27. Transworld Telecommunications, Inc., Tampa Bay, Inc., Marrco Communications, Inc., United Communications, Ltd. and the Cellular Group
28. Tribune Broadcasting Company
29. United Telephone Mutual Aid Corporation, Pioneer Telephone Cooperative, Inc. and Socorro Satellite Systems, Inc.
30. The Wireless Cable Association International, Inc.
31. Wireless One, L.L.C.
32. WJB-TV Limited Partnership

APPENDIX B -- FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

I. Need For, and Purpose of, This Action

The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rulemaking* in MM Docket No. 94-131. As noted in that initial analysis, this proceeding will streamline the procedures for filing applications in MDS, and thereby expedite the provision of services to the public.

Under the terms of the 1993 Budget Act, the Commission may now utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis within the *Notice of Proposed Rulemaking* in PP Docket No. 93-253, and published a Final Regulatory Flexibility Analysis within the *Second Report and Order* in that docket. As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among mutually exclusive initial MDS applications, and will carry out congressional mandates that certain designated entities be afforded an opportunity to participate in the competitive bidding process and the provision of spectrum-based services.

II. Legal Basis for This Action

Authority for the action taken in this proceeding may be found in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), and 403.

III. Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

No comments were submitted in response to our Initial Regulatory Flexibility Analysis for either MM Docket No. 94-131 or PP Docket No. 93-253.

IV. Significant Alternatives Considered

Although, as described in (III) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis for MM Docket No. 94-131 and PP Docket No. 93-253, the *Second Report and Order* addressed at length the general policy considerations raised as a result of the new competitive bidding legislation. This *Report and Order* considered in detail various alternatives for revising MDS application procedures and implementing competitive bidding for MDS, and the comments submitted on such alternatives.

This *Report and Order* also specifically considered the impact of the provisions adopted on small entities. Overall, the Commission believes that the provisions adopted herein would benefit small entities by employing short-form applications for MDS and by providing certain special incentives to small entities in the competitive bidding process. In addition, the Commission, while authorizing electronic filing, did not make such filing, with its possible associated costs, mandatory for MDS applicants.

APPENDIX C

I. Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 21- Domestic Public Fixed Radio Services

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 602; 47 U.S.C. 552, 554.

2. Section 21.2 is amended as follows:

§ 21.2 Definitions.

As used as follows:

* * * * *

Basic Trading Area (BTA). The geographic areas by which the Multipoint Distribution Service is licensed. BTA boundaries are based on the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, pp. 36-39, and include six additional BTA-like areas as specified in § 21.924(b).

BTA authorization holder. The individual or entity authorized by the Commission to provide Multipoint Distribution Service to the population of a BTA.

BTA service area. The area within the boundaries of a BTA to which a BTA authorization holder may provide Multipoint Distribution Service. This area excludes the protected service areas of incumbent MDS stations and the registered receive sites of previously authorized and proposed ITFS stations.

Incumbent. An MDS station that was authorized or proposed before September 15, 1995, including those stations that are subsequently modified, renewed or reinstated.

Partitioned service area authorization holder. The individual or entity authorized by the Commission to provide Multipoint Distribution Service to the population of a partitioned service area.

Partitioned service area (PSA). The area within the coterminous boundaries of one of more counties or other geopolitical subdivisions, drawn from a BTA, to which an authorization holder may provide Multipoint Distribution Service or the area remaining in a BTA upon partitioning any portion of that BTA. This area excludes the protected service areas of incumbent MDS stations and the registered receive sites of previously authorized and proposed ITFS stations.

* * * * *

3A. Section 21.7 is amended to read as follows:

§ 21.7 Standard application form for domestic public fixed radio service licenses.

Except for the Multipoint Distribution Service, * * *

3. Section 21.13 is amended to read as follows:

§ 21.13 General application requirements.

a) * * * * *

(4) Except for applications in the Multipoint Distribution Service filed on or after September 15, 1995, state specifically the reasons why a grant of the proposal would serve the public interest, convenience, and necessity.

(b) Applications in the Multipoint Distribution Service, the Digital Electronic Message Service (DEMS) and the Point-to-Point Microwave Service shall not cross-reference previously filed material. Applications other than for the Multipoint Distribution Service, DEMS and Point-to-Point Microwave Services may cross-reference previously filed material where documents, exhibits or other lengthy showings already on file with the Commission contain information which is required by an application form and may specifically refer to such information, if:

* * * * *

4. Section 21.15 is amended to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(a)(1) Except in the case of applicants for Multipoint Distribution Service stations who filed applications on or after September 15, 1995, applicants proposing a new station location (including receive-only stations and passive repeaters) must indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site must be demonstrated. Under ordinary circumstances, this requirement will be considered satisfied if the site is under lease or under written option to buy or lease.

* * *

(3) Except for BTA and PSA authorization holders, Multipoint Distribution Service applicants proposing a new station location must certify the proposed station site will be available to the applicant for timely construction of the facilities during the initial

construction period.

* * * * *

(c) Each application involving a new or modified antenna supporting structure or passive facility, the addition or removal of an antenna, or the repositioning of an authorized antenna for a station or receive-only facility (except receive-only facilities in Multipoint Distribution Service and the Digital Electronic Message Service) must be accompanied by a vertical profile sketch of the total structure depicting its structural nature and clearly indicating the ground elevation (above sea level) at the structure site, the overall height of the structure above ground (including obstruction lights when required, lightning rods, etc.) and, if mounted on a building, its overall height above the building. The proposed antenna on the structure must be clearly identified and its height above-ground (measured to the center of radiation) clearly indicated. Alternatively, applicants in the Multipoint Distribution Service who filed applications on or after September 15, 1995 may provide this information in the MDS long-form application.

* * * * *

(e) Except for applicants in the Multipoint Distribution Service who filed applications on or after September 15, 1995, an applicant proposing construction of one or more new stations or modification of existing stations where substantial changes in the operation or maintenance procedures are involved must submit a showing of the general maintenance procedures involved to insure the rendition of good public communications service. The showing should include but need not be limited to the following:

* * * * *

(g) Except for applications in the Multipoint Distribution Service filed on or after September 15, 1995, each application in the Point-to-Point Radio, Local Television Transmission and Digital Electronic Message Service (excluding user stations) proposing a new or replacement antenna (excluding omni-directional antennas) shall include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plane expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the FCC-ID number that indicates that the pattern is on file with the Commission. Multipoint Distribution Service applicants who filed applications on after September 15, 1995 must provide related information in completing an MDS long-form application.

* * * * *

5. Section 21.27 is amended to read as follows:

§ 21.27 Public notice period.

(a) * * * * *

(7) the BTAs designated for licensing through the competitive bidding process and the filing date for short-form applications for those areas;

(8) the auction winners in the competitive bidding process;

* * * * *

6. Section 21.35 is amended to read as follows:

§ 21.35 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications in services under this rules part where the competitive bidding process or random selection process do not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) in this section if:

* * * * *

7. Section 21.41 is amended to read as follows:

§ 21.41 Special processing of applications for minor facility modifications.

* * * * *

(b) * * * * *

(7) In the Multipoint Distribution Service, the modified facility would not produce a power flux density that exceeds - 73 dBW/m^2, pursuant to §§ 21.902 and 21.939 of this subpart, at locations on the boundaries of protected service areas to which there is an unobstructed signal path.

* * * * *

8. Section 21.42 is amended to read as follows:

§ 21.42 Certain modifications not requiring prior authorization.

(a) Equipment in an authorized radio station may be replaced without prior authorization or notification if:

(1) The replacement equipment is identical (i.e., same manufacturer and model number) with the replacement equipment;

(2) For the Multipoint Distribution Service, the replacement transmitter, transmitting antenna, transmission line loss and/or devices between the transmitter and antenna, or

combinations of the above, do not change the EIRP of a station in any direction.

(b) * * * * *

(3) The Commission is notified of changes made to facilities by the submission of a completed FCC Form 494 or for the Multipoint Distribution Service, an MDS long-form application, as applicable, within thirty days after the changes are made.

(4) In the Multipoint Distribution Service, the modified facility would not produce a power flux density at the protected service area boundary that exceeds - 73 dBW/m^2, pursuant to §§ 21.902 and 21.939 of this subpart.

(c) * * * * *

(3) * * *

(i) * * *

(ii) For Digital Electronic Message Service, the new antenna conforms with § 21.906 and the gain of the new antenna does not exceed that of the previously authorized antenna by more than one dB in any direction.

(iii) For the Multipoint Distribution Service, the new antenna conforms with § 21.906 and the EIRP resulting from the new antenna does not exceed that resulting from the previously authorized antenna by more than one dB in any direction.

* * * * *

(d) Licensees may correct erroneous information on a license which does not involve a major change (i.e., a change that would be classified as a major amendment as defined by § 21.23) without obtaining prior Commission approval by filing a completed FCC Form 494, or for the Mutlipoint Distribution Service licensees, by filing the MDS long-form application.

9. Section 21.43 is amended to read as follows:

§ 21.43 Period of construction; certification of completion of construction.

(a) Except for Multipoint Distribution Service station licenses granted to BTA and PSA authorization holders, each license for a radio station for the services included in this Part shall specify as a condition therein the period during which construction of facilities will be completed and the station made ready for operation. * * *

* * * * *

10. Section 21.44 is amended to read as follows:

§ 21.44 Forfeiture and termination of station authorization.

(a) * * *

(1) The expiration of the construction period specified therein, where applicable, or after such additional time as may be authorized by the Commission, unless within 5 days after that date certification of completion of construction has been filed with the Commission pursuant to § 21.43;

* * * * *

11. Section 21.900 is amended to read as follows:

§ 21.900 Eligibility.

* * * * *

(c) * * *

The applicant shall state whether or not service will be provided on a common carrier or non common carrier basis. In addition, a common carrier applicant shall state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.
* * *

12. Section 21.901 is amended to read as follows:

§ 21.901 Frequencies.

* * * * *

(d) * * *

* * * * *

(5) Notwithstanding the provision of § 21.31(a) all applications, except for those filed on or after September 15, 1995, that propose to locate transmission facilities within or within 24.1 kilometers (15 miles) of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. * * *

(6) * * *

(7) All applications for frequencies in this band, except for those filed on or after September 15, 1995, must contain a showing of how interference with the operation of adjacent channels will be avoided and what steps the applicant has taken to comply with § 21.902(a) of this part.

* * * * *

13. Section 21.902 is amended to read as follows:

§ 21.902 Frequency interference.

(a) All applicants, conditional licensees, and licensees shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and cochannel use in nearby cities. In areas where major cities are in close proximity, careful consideration should be given to minimum power requirements and to the location, height, and radiation pattern of the transmitting antenna. Licensees, conditional licensees, and applicants are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(b) As a condition for use of frequency in this service, each applicant, conditional licensee, and licensee is required to:

(1) Not enter into any lease or contract or otherwise take any action that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area.

* * * * *

(3) Engineer the system to provide at least 45 dB of cochannel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously proposed station that transmit, or may transmit, signals for standard television reception.

(4) Engineer the station to provide at least 0 dB of adjacent channel interference protection within the 56.33 km (35 mile) protected service area of any authorized or previously proposed station that transmits, or may transmit, signals for standard television reception.

(5)(i)Engineer the station to limit the calculated free space power flux density to - 73 dBW/m^2 at the boundary of a 56.33 km (35 mile) protected service area, where there is an unobstructed signal path from the transmitting antenna to the boundary; or alternatively, obtain the written consent of the entity authorized for the adjoining area to exceed the - 73 dBW/m^2 limiting signal strength at the common boundary.

(ii) In determining signal path conditions, the following shall be used: a 9.1 meter (30 feet) receiving antenna height, the transmitting antenna height, terrain elevations and 4/3 earth radius propagation conditions.

(6) If a proposed station is within 80 km (50 miles) of the Canadian or Mexican border, the station must be designed to meet the requirements set forth in international treaties.

(c) The following interference studies must be prepared, must be available to the Commission upon request, and may be submitted as part of any application:

(1) An analysis of the potential for harmful interference within the 56.33 km (35 mile) protected service areas of any authorized or previously proposed incumbent station:

(i) if the coordinates of the applicant's proposed transmitter are within 160.94 km (100 miles) of the center coordinates of any authorized or previously proposed incumbent station with protected service area of 56.33 km (35 miles) as specified in § 21.902(d); or

* * * * *

(2) Applicants may design interference studies in any manner that demonstrates the avoidance of harmful interference, as defined in this subpart.

(i) In lieu of interference studies, applicants may submit in accordance with § 21.938 a written statement of no objection to the operation of the MDS station.

(ii) The Commission may direct applicants to submit interference studies of a specific nature.

(3) Except for new stations proposed in applications filed after June 15, 1995, in the case of a proposal to operate a non-colocated station within the protected service area of an authorized, or previously proposed, adjacent channel station, an analysis that identifies the areas within the protected service areas of both the authorized or previously proposed adjacent channel station and the proposed station that cannot be protected as specified in § 21.902(b)(4) and an explanation of why the proposed station cannot be colocated with the existing or previously proposed station.

* * * * *

(5) [Removed.]

(d)(1) Subject to the limitations contained in subsection (e) of this section, each MDS station licensee shall be protected from harmful electrical interference, as determined by the theoretical calculations, for a protected service area of which the boundary will be 56.3255 kilometers (35 miles) from the transmitter site.

(2) As of September 15, 1995, the location of these protected service area boundaries shall become fixed. The center of the circular area shall be the geographic latitude and longitude of the transmitting antenna site specified in station authorizations or previously proposed applications filed at the Commission before September 15, 1995. Subsequent transmitter site changes will not change the location of the 56.3255 kilometers (35 mile) protected service area boundaries.

* * * * *

(f) In addressing potential harmful interference in this service, the following definitions, procedures and other criteria shall apply:

(1) * * * Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 45 dB.

(2) * * * Harmful interference will be considered present when a free space calculation for an unobstructed signal path determines that this ratio is less than 0 dB. * * *

* * * * *

(4) For purposes of this section, the received signal power level $(RSL)_{dBW}$ at the output of the FCC reference receiving antenna is obtained from the following formulas (or an equivalent adaptation):

$$(RSL)_{dBW} = (EIRP)_{dBW} - (L_{FS})_{dB} + (G_{AR})_{dB}$$

where the free space loss (L_{FS}) is

$$(L_{FS})_{dB} = 20 \log (4\pi d/\lambda) \text{ dB}$$

in which the parameters are defined as follows:

$(RSL)_{dBW}$ is the received power in decibels referenced to one watt.
$(EIRP)_{dBW}$ is the equivalent isotropically radiated power in decibels above one watt.
d is the distance of the signal path in meters.
λ is the wavelength of the signal in meters.
G_{AR} is the dB gain of the reference receiving antenna above an isotropic antenna (obtained from Figure 1 of this section.)

(5) A determination of signal path conditions shall use a 9.1 meters (30 feet) receiving antenna height, the transmitting antenna height, terrain elevation, and assume 4/3 earth radius propagation conditions.

(6) An application will not be accepted for filing if cochannel or adjacent channel interference is predicted at the boundary of the 56.33 km (35 mile) protected service area of an authorized or previously proposed incumbent station based on the following criteria:

(i) interference calculations shall be made only for directions where there is an unobstructed signal path from the site of a proposed station to the boundary of any protected area.

(ii) calculations of received power levels in units of dBW from the proposed station will be made at one degree intervals around the protected service area.

(iii) the assumed value of the desired signal level at the boundary of an incumbent station shall be - 83 dBW, which is the calculated received power in free space at a distance of 56.33 km (35 miles), given an EIRP of 2000 watts and a receiver antenna gain of 20 dBi.

(iv) harmful interference will be considered to occur at locations along the boundary wherever the ratio between the desired signal level of - 83 dBw and the received power from a proposed cochannel or adjacent channel station is less than 45 dB or 0 dB for cochannel or adjacent channel proposals, respectively.

(7) Alternatively, MDS applications will be accepted on the basis of an executed written interference agreement between potentially affected parties filed in accordance with § 21.938.

(g)(1) All interference studies submitted pursuant to paragraph (c) of this section must be served on all licensees, conditional licensees, and applicants for the stations required to be studied by this section. This service must include a copy of the FCC application and occur on or before the date the application is filed with the Commission.

(2) MDS licensees, conditional licensees and applicants of facilities with 56.33 km (35 mile) protected service areas shall notify in writing the holders of authorizations for adjoining BTAs or PSAs of application filings for modified station licenses, provided the proposed facility would produce an unobstructed signal path to any location within the adjoining BTA or PSA. This service must include a copy of the FCC application and occur on or before the

date the application is filed with the Commission.

(h) For purposes of § 21.31(a) an MDS application, except for those applications filed after June 15, 1995, filed for a facility that would cause harmful electrical interference within the protected service area of any authorized or previously proposed station will be presumed to be mutually exclusive with the application for such authorized or previously proposed station.

* * * * *

14. Section 21.904 is amended to read as follows:

§ 21.904 Transmitter power.

* * * * *

(c)(1) An increase in station transmitter power, above currently-authorized or previously proposed values, to the maximum values provided in subsections (a) and (b) of this section, may be authorized, if the requested power increase would not cause harmful interference to any authorized or previously proposed co-channel or adjacent-channel station with a transmitter site within 80.5 kilometers (50 miles) of the applicant's transmitter site, or if an applicant demonstrates that:

(i) A station, that must be protected from interference, potentially could suffer interference that would be eliminated by increasing the power of the interfered-with station; and

(ii) The applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power to the interfered-with station.

* * * * *

15. Section 21.913 is amended to read as follows:

§ 21.913 Signal booster stations.

* * * * *

(b) In addition to the other application requirements of this part, each application for a signal booster station that would retransmit an MDS signal must certify that the proposed booster station site is within the protected service area, as defined in §§ 21.902(d) and 21.934, of the MDS station.

(c) In addition to the other application requirements of this Part, each application for a signal booster station that would retransmit an MDS signal must state in the application that it has prepared a study which demonstrates that the power flux density at the edge of the MDS

protected service area does not exceed - 73.0 dBW/m^2 at locations for which there is an unobstructed siganl path to the boundary.

(d) In addition to the other application requirements of this part, each application for a signal booster station must state in the application that is has prepared a study which demonstrates that the proposed booster station will cause no harmful interference to co-channel and adjacent-channel existing or previously-proposed ITFS and MDS stations with transmitters within 80.5 kilometers (50 miles) of the proposed booster station's transmitter site.

(e) In addition to the other application requirements of this part, each application must include a written consent statement of the licensee of each MDS, ITFS, and OFS station whose signal is retransmitted.

* * * * *

(g) * * *

* * * * *

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -73.0 dBW/m^2, if the signal of an MDS station is repeated;

* * * * *

II. The following sections are added as amendments to Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations:

§ 21.921 Basis and purpose for electronic filing and competitive bidding process.

(a) *Basis*. The rules for competitive biding procedures for the Multipoint Distribution Service (MDS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, which vests authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations, and § 309(j) of the Act, which vests authority in the Commission to conduct competitive bidding.

(b) *Purpose*. This part states the conditions under which portions of the radio spectrum are made available and licensed for Multipoint Distribution Service via the competitive bidding procedures.

(c) *Scope*. The rules in this part apply only to authorizations and station licenses granted under the competitive bidding procedures of this section. This subpart contains some of the procedures and requirements for the issuance of authorizations to construct and operate multipoint distribution services. One also should consult Part 1, Subpart Q of the Commission's rules, §§ 21.1 through 21.406 and 21.900 through 21.920 of this subpart, and

other Commission rules of importance with respect to the licensing and operation of MDS stations.

§ 21.922 Authorized frequencies.

The frequencies in the MDS service available through the competitive bidding process are in the frequency allocations table of § 21.901 of this subpart.

§ 21.923 Eligibility.

Any individual or entity, other than those precluded by §§ 21.4 and 21.912 of this subpart, is eligible to receive a Basic Trading Area (BTA) authorization and a station license for each individual MDS station within the BTA. There is no restriction on the number of BTA authorizations or MDS station licenses, including multiple cochannel station licenses, sought by or awarded to a qualified individual or entity.

§ 21.924 Service areas.

(a) MDS service areas are regional Basic Trading Areas (BTAs) which are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39. The BTA Map is available for public inspection at the public reference room, Multipoint Distribution Service, Video Services Division, Mass Media Bureau, Room 207, 2033 M Street, N.W., Washington, DC.

(b) The following additions will be available for licensing separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; San Juan, Puerto Rico; Mayagüez/Aguadilla-Ponce, Puerto Rico; and the United States Virgin Islands.

(c) The area within the boundaries of a BTA to which a BTA authorization holder may provide Mutlipoint Distribution Service excludes the protected service areas of any incumbent MDS stations and the registered receive sites of previously authorized or proposed ITFS stations.

§ 21.925 Applications for BTA authorizations and MDS station licenses.

(a)(1) An applicant must file a short-form application and, when necessary, the short-form application supplement, identifying each BTA service authorization sought.

(2) For purposes of conducting competitive bidding procedures, short-form applications are considered to be mutually exclusive with each other if they were filed for, and specified the same, BTA service area.

(b)Separate long-form applications must be filed for each individual MDS station license

sought within its the protected service area of a BTA or PSA, including:

(1) an application for each E-channel group, F-channel group, and single H, 1, and 2A channel station license sought;

(2) an application for authority to operate at an MDS station in the area vacated by an MDS station incumbent that has forfeited its station license; and

(3) an application for each ITFS-channel group station license sought in accordance with §§ 74.990 and 74.991.

(c) The Commission shall grant BTA authorizations to auction winners as set forth in § 21.958.

(d) No long-form application filed by the BTA authorization holder will be accepted prior to completion of the competitive bidding process and no long-form application will be granted until expiration of the 30-day petition to deny period following the public notice listing of the application as being accepted for filing.

(e) Applicants may use the electronic filing procedures to file both the Multipoint Distribution Service short-form and long-form applications with the Commission.

§ 21.926 Amendments to long-form applications.

(a) A Multipoint Distribution Service long-form application may be amended as a matter of right up to the date of the public notice announcing the application has been accepted for filing provided that:

(1) the proposed amendments do not amount to more that a *pro forma* change of ownership and control;

(2) the Commission has not otherwise forbidden the amendment of pending applications.

(b) Requests to amend a long-form application placed on public notice as being accepted for filing may be granted only if a written petition demonstrating good cause is submitted and properly served on the parties of record.

§ 21.927 Sole bidding applicants.

Where the deadline for filing MDS short-form applications has expired and a particular BTA service area has been specified in a single short-form application only, the applicant shall be named the auction winner for that BTA authorization.

§ 21.928 Acceptability of short- and long-form applications.

The acceptability of short- and long-form applications will be determined according to the

requirements of §§ 21.13, 21.15, 21.20, 21.21 and 21.952.

§ 21.929 Authorization period for station licenses.

Notwithstanding § 21.45, each new MDS station licensed within a BTA or PSA will be granted for a term of ten years, terminating ten years from the date the Commission declared bidding closed in the MDS auction.

§ 21.930 Five-year build-out requirements.

(a)(1)A BTA authorization holder has a five-year build-out period, beginning on the date of the grant of the BTA authorization and terminating on the 5th year anniversary of the grant of the authorization, within which it may develop and expand MDS station operations within its service area.

(2) This period is not extended by the grant of subsequent authorizations (*i.e.*, grant of a station license or modification).

(3) Timely certifications of completion of construction for each MDS station within a BTA or partitioned service area must be filed upon completion of construction of a station.

(b) Each BTA authorization holder has the exclusive right to build, develop, expand and operate MDS stations within its BTA service area during the five-year build-out period. The Commission will not accept competing applications for MDS station licenses within the BTA service area during this period.

(c)(1) Within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals pursuant to § 21.907 that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent stations.

(2) Sixty days prior to the end of the five-year build out period, the BTA authorization holder must file with the Commission proof that demonstrates the holder has met the requirements of § 21.930(c)(1). The most recent census figures available from the U.S. Department of Commerce, Bureau of Census prior to the expiration of the authorization holder's five-year build-out period will be used to determine compliance with population-based requirements. In no event shall census figures gathered prior to 1990 be used.

(d)(1) If the Commission finds that the BTA authorization holder has demonstrated that it has met the requirements of § 21.930(c)(1), the Commission will issue a declaration that the holder has met such requirements.

(2) If the Commission finds that the BTA authorization holder has not provided a signal as required in § 21.930(c)(1), the Commission shall partition from the BTA any unserved area, using county lines as a guide, and shall re-authorize service to the unserved area pursuant to the MDS competitive bidding procedures of this subpart. Applications for such unserved areas are not acceptable for filing until a filing date is announced through a public notice.

(i) The competitive bidding procedures set forth in §§ 21.950 to 21.961 shall be

followed by applicants seeking authority to provide MDS service to the unserved partitioned area.

(ii) The BTA authorization holder originally authorized to provide service is ineligible to participate in the competitive bidding process for the unserved areas partitioned from its BTA.

§ 21.931 Partitioned service areas (PSAs).

(a)(1) The holder of a BTA authorization may enter into contracts with eligible parties to partition any portion of its service area according to county boundaries, or according to other geopolitical subdivision boundaries, or multiple contiguous counties or geopolitical subdivisions within the BTA service area.

(2)(i) Partitioning contracts must be filed with the Commission within 30 days of the date that such agreements are reached.

(ii) The contracts must include descriptions of the areas being partitioned and include any documentation necessary to convey to the Commission the precise boundaries of the partitioned area.

(3) Parties to partitioning contracts must file concurrently with such contracts one of the following, where appropriate:

(i) an MDS long-form application for authority to operate a new MDS station within the PSA;

(ii) applications for assignment or transfer of existing stations within the PSA; or

(iii) a statement of intention as defined in § 21.956(a) along with a completed FCC Form 430.

(b) The eligibility requirements applicable to BTA authorization holders also apply to those individuals and entities seeking PSA authorizations.

(c) Any individual or entity acquiring the rights to a partitioned area of a BTA also acquires the rights to any previously authorized individual stations located within the partitioned area that were held by the previous authorization holder, provided that grantable applications for assignment and transfer of control, FCC Forms 702 and 704, are filed for existing stations and that acceptable amendments to pending long-form applications are filed. Pending long-form applications filed by the previous authorization holder for transmitter sites within the PSA may also be dismissed without prejudice at the applicant's request.

(d) Authorizations for PSAs will be issued in accordance with § 21.958; however, when individual stations within an PSA are assigned along with the partitioned area, the authorization will be granted concurrently with the grant of the applications for assignment and transfer of the existing stations.

(e) Subsequent to issuance of the authorization for a PSA, the partitioned area will be treated as a separate protected service area.

(f)(1) When any area within a BTA becomes a PSA, the remaining counties and other

geopolitical subdivisions within that BTA will also be subsequently treated and classified as a PSA(s).

(2) At the time a BTA is partitioned, the Commission shall cancel the BTA authorization initially issued and issue a PSA authorization to the former BTA authorization holder.

(g) The duties and responsibilities imposed upon BTA authorization holders in this part and throughout the Commission's rules, such as § 21.930(c)(1), apply to the holders of PSA authorizations.

(h) The build-out period for PSAs voluntarily partitioned shall be the remainder of the five-year build-out period applicable to the BTA or PSA from which the PSA was drawn. For PSA authorizations issued pursuant to § 21.930(d)(2) and the competitive bidding process, the build-out period is five years, beginning on the date of the grant of the PSA authorization. The requirements of § 21.930(c)(1) also apply to the holders of authorizations for PSAs.

§ 21.932 Forfeiture of incumbent MDS station licenses.

(a) If the license for a incumbent MDS station is forfeited, absent the filing and grant of a petition for reinstatement pursuant to § 21.44(b), the 56.33 km (35 mile) protected service area of the incumbent station shall dissolve and the protected service area shall become part of the BTA or PSA surrounding it.

(b) If upon forfeiture the protected service area of a forfeited license extends across the boundaries of more than one BTA or PSA, the portions of the protected service area of the incumbent station shall merge with the overlapping BTAs or PSAs.

(c) The holder of the authorization for the BTA or PSA with which the service area of the forfeited incumbent station has merged has the exclusive right to file a long-form application to operate a station within the merged area and may modify the locations of its stations to serve the forfeited area.

§ 21.933 Protected service areas.

(a) The stations licensed to the holder of a BTA authorization shall have a protected service area that is coterminous with the boundaries of that BTA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and the registered receive sites of previously proposed and authorized ITFS facilities within that BTA.

(b) The stations licensed to the holder of a PSA authorization shall have a protected service area that is coterminous with the boundaries of the counties or other geopolitical subdivisions comprising the PSA, subject to the exclusion of the 56.33 km (35 mile) protected service area of incumbent MDS stations and the registered receive sites of previously proposed and authorized ITFS facilities within that PSA.

§ 21.934 Assignment or transfer of control of BTA authorizations.

(a)(1) A BTA or PSA authorization holder seeking approval for a transfer of control or assignment of its authorization within three years of receiving such authorization through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its authorization was obtained through competitive bidding.

(2) Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its authorization. This information should include not only a monetary price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing).

(b) Transfers of control or assignments of BTA or PSA authorizations are subject to the limitations of §§ 21.4, 21.900 and 21.912 of this subpart.

(c) The anti-trafficking provision of § 21.39 does not apply to the assignment or transfer of control of a BTA or PSA authorization, which was granted pursuant to the Commission's competitive bidding procedures.

§ 21.935 Assignment or transfer of control of station licenses within a BTA.

Licenses for individual stations within a BTA or PSA area issued to authorization holders may not be transferred or assigned unless they are acquired as part of a PSA.

§ 21.936 Cancellation of authorization.

(a) The Commission may revoke or cancel a BTA or PSA authorization for gross misconduct, misrepresentation or bad faith on the part of the authorization holder.

(b) Cancellation of a BTA or PSA authorization shall result in termination of any rights the authorization holder holds in individual proposed or authorized stations within the BTA or PSA.

§ 21.937 Negotiated interference protection.

(a) The level of acceptable electromagnetic interference that occurs at or within the boundaries of BTAs, PSAs, or an incumbent MDS station's 56.33 km (35 mile) protected service area can be negotiated and established by an agreement between the appropriate parties, provided that:

(1) the parties to such an agreement file with the Commission a written statement of no

objection, acknowledging that the parties have agreed to accept a level of interference that does not meet the protection standards set forth in §§ 21.902 or 21.938 of the Commission's rules;

(2) the statement bears the signatures of all parties to the agreement, or the signatures of their representative agents; and

(3) the statement is filed with the Commission within 30 days of its ratification or filed in conjunction with an application with which the agreement is associated, whichever is earliest.

§ 21.938 BTA and PSA technical and interference provisions.

(a) BTA or PSA authorization holders are expected to cooperate with one another by designing their stations in a manner that protects service in adjoining BTAs and PSAs, including consideration of interference abatement techniques such as cross polarization, frequency offset, directional antennas, antenna beam tilt, EIRP decrease, reduction of antenna height, and terrain shielding.

(b) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, stations licensed to a BTA or PSA authorization holder must not cause harmful electromagnetic interference to the following:

(1) the protected service areas of other authorization holders in adjoining BTAs or PSAs.

(2) the 56.33 km (35 mile) protected service areas of authorized or previously proposed MDS stations (incumbents).

(3) registered receive sites and protected service areas of authorized or previously proposed stations in the Instructional Television Fixed Service pursuant to the manner in which interference is defined in § 74.903(a).

(c) Unless the affected parties have executed a written interference agreement in accordance with § 21.937, it shall be the responsibility of a BTA or PSA authorization holder to correct at its expense any condition of harmful electromagnetic interference caused to authorized MDS service at locations within other BTAs or PSAs or within the 56.33 km (35 mile) protected service areas of authorized or previously proposed MDS stations (incumbents).

(d) Unless specifically excepted, BTA or PSA authorization holders are governed by the interference protection and other technical provisions applicable to the Multipoint Distribution Service.

(e) The calculated free space power flux density from a station may not exceed - 73 dBW/m^2 at locations on BTA or PSA boundaries for which there is an unobstructed signal path from the transmitting antenna to the boundary, unless the applicant has obtained the written consent of the authorization holder for the adjoining BTA or PSA.

(f)(1) Authorization holders for BTAs or PSAs must notify authorization holders of adjoining areas of their application filings for new or modified stations; provided the proposed facility would produce an unobstructed signal path anywhere within the adjoining BTA or PSA.

(2) This service of written notification must include a copy of the FCC application and occur on or before the date the application is filed with the Commission.

(3) With regard to incumbent MDS stations, authorization holders for BTAs or PSAs must comply with the requirements of § 21.902.

(g) Where a PSA adjoins a BTA and both authorizations are held by the same individual or entity, the PSA shall be considered an extension of the protected service area of the BTA regarding the interference protection, limiting signal strength, and notification provisions of this section.

§ 21.939 Harmful interference abatement.

In the event harmful interference occurs or appears to occur, after notice and an opportunity for a hearing, Commission staff may require any Multipoint Distribution Service conditional licensee or licensee to:

(a) modify the station to use cross polarization, frequency offset techniques, directional antenna, antenna beam tilt, or

(b) order an equivalent isotropically radiated power decrease, a reduction of transmitting antenna height, a change of antenna location, a change of antenna radiation pattern, or a reduction in aural signal power.

§ 21.940 to § 21.949

[Reserved.]

§ 21.950 MDS subject to competitive bidding.

Mutually exclusive MDS initial applications are subject to competitive bidding. The general procedures set forth in 47 C.F.R. Chapter I, Part 1, Subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive MDS applicants, unless otherwise provided in 47 C.F.R. Chapter I, Part 21, Subpart K.

§ 21.951 MDS competitive bidding procedures.

(a) The following competitive bidding procedures will generally be used in MDS auctions. Additional, specific procedures may be set forth by public notice. The Commission may also design and test alternative procedures. *See* 47 C.F.R. §§ 1.2103 and 1.2104.

(1) *Competitive bidding design.* Simultaneous multiple round bidding will be used in MDS

auctions, unless the Commission specifies by public notice the use of sequential oral (open outcry) bidding or sealed bidding (either sequential or simultaneous). Combinatorial bidding may also be used with any type of auction design.

(2) *Competitive bidding mechanisms*. The Commission may utilize the following mechanisms in MDS auctions:

(i) *Sequencing*. The Commission will establish and may vary the sequence in which the BTA service areas will be auctioned.

(ii) *Grouping*. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which BTA service areas will be auctioned simultaneously or in combination.

(iii) *Reservation price*. The Commission may establish a reservation price, either disclosed or undisclosed, below which a BTA service area subject to auction will not be awarded.

(iv) *Minimum bid increments*. The Commission will, by announcement before or during an MDS auction, require minimum bid increments in dollar or percentage terms.

(v) *Stopping rules*. The Commission will establish stopping rules before or during multiple round MDS auctions in order to terminate an auction within a reasonable time.

(vi) *Activity Rules*. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, the Commission will allow bidders to request and to receive automatically waivers of such rule, the number of which will be determined by the Commission.

(vii) *Suggested minimum bid*. The Commission may establish suggested minimum bids on each BTA service area subject to auction. Bids below the suggested minimum bid would count as activity under the activity rule only if no bids at or above the suggested minimum bid are received.

(b) *Identities of bidders*. The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers. The Commission will announce by public notice before the MDS auction whether the bidders' identities will be revealed.

(c) *Commission control of auction*. The Commission may delay, suspend, or cancel an MDS auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning

of the current or some previous round or cancel the competitive bidding in its entirety.

§ 21.952 Bidding application procedures.

(a) *Short-form applications*. To participate in MDS auctions, all applicants must submit short-form applications, along with all required certifications and exhibits specified by such forms, pursuant to the provisions of § 1.2105(a) and any Commission public notices. *See* 47 C.F.R. § 1.2105(a).

(b) *Filing of short-form applications*. Prior to any MDS auction, the Commission will issue a public notice announcing the availability of BTA service areas and, in the event that mutually exclusive short-form applications (as defined by § 21.925(a)(2)) are filed, the date of the auction for those BTA service areas. This public notice also will specify the date on or before which applicants intending to participate in an MDS auction must file their short-form applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the material which must accompany the forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed.

(c) *Modification and dismissal of short-form applications*.

(1) Any short-form application that is not signed in some manner or form, including by electronic means, and does not contain all requisite certifications is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. Such short-form application will be dismissed with prejudice.

(2) The Commission will provide bidders a limited opportunity to cure certain defects specified herein and to resubmit an amended short-form application. For MDS, we classify all amendments to a short-form application as major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia or joint bidding arrangements specifically permitted under § 21.953. A short-form application may be modified to make minor amendments. However, applicants who fail to correct defects in their short-form applications in a timely manner as specified by public notice will have their applications dismissed with no opportunity for resubmission.

(3) A short-form application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

§ 21.953 Prohibition of collusion.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, after the filing of short-form applications, all applicants in an MDS auction are prohibited from cooperating,

collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the winning bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicant's short-form application. Communications among applicants concerning matters unrelated to the MDS auction will be permitted after the filing of short-form applications.

(b) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for the same BTA service areas.

(c) After the filing of short-form applications, applicants may make agreements to bid jointly for BTA service areas, provided the parties to the agreement have not applied for the same service areas.

(d) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may, under the circumstances specified in § 1.2105(c)(4), acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for the same BTA service areas. *See* 47 C.F.R. § 1.2105(c)(4).

(e) To reflect the changes in ownership or in the membership of consortia or joint bidding arrangements specified in paragraphs (b), (c) and (d) of this section, applicants must amend their short-form applications by submitting a revised short-form application, filed within two business days of any such change; such modifications will not be considered major amendments of the applications within the meaning of § 21.952(c)(2). However, any amendment which results in the change of control of an applicant will be considered a major amendment of the short-form.

(f) For purposes of this section, the terms "applicant" and "bids or bidding strategies" are defined as set forth in 47 C.F.R. § 1.2105(c)(5).

§ 21.954 Submission of upfront payments.

(a) The Commission will require applicants to submit an upfront payment prior to the MDS auction. The amount of the upfront payment for each BTA service area being auctioned and the procedures for submitting it will be set forth in a public notice. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. No interest will be paid on upfront payments.

(b) For MDS auctions, the Commission will require each applicant to submit an upfront payment equal to the largest combination of activity units (as defined in the Commission's

activity rules established pursuant to § 21.951(a)(2)(vi)) associated with the BTAs on which the applicant anticipates being active in any single round of bidding. Applicants who are small businesses eligible for reduced upfront payments will be required to submit an upfront payment amount in accordance with § 21.960(c). If an upfront payment is not in compliance with the Commission's rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any BTA service area being auctioned will be ineligible to bid, its application will be dismissed, and any upfront payment it has made will be returned.

(c) The upfront payment(s) of a bidder will be credited toward any down payment required for the BTA service areas on which the bidder is the winning bidder. Where the upfront payment amount exceeds the required down payment of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal payments are owed by that bidder. In the event a payment is assessed pursuant to § 21.959(a) for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default payment before being applied toward any additional payment obligations that the winning bidder may have.

§ 21.955 Submission of down payments.

(a) After bidding has ended on all BTA service areas, the Commission will identify and notify the winning bidders and declare the bidding closed in the MDS auction. Within five (5) business days after being notified that it is a winning bidder on a particular BTA service area(s), a winning bidder must submit to the Commission's lockbox bank such additional funds as are necessary to bring its total deposits (upfront payment plus down payment) up to twenty (20) percent of its winning bid(s). This down payment may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(b) Winning bidders who are small businesses eligible for installment payments under § 21.960(b) are only required to bring their total deposits up to ten (10) percent of their winning bids. Such small businesses must pay the remainder of the twenty (20) percent down payment within five (5) business days following release of the public notice stating that their BTA authorizations are ready to be issued.

(c) Down payments will be held by the Commission until the winning bidder has been issued its BTA authorization and has paid the remaining balance of its winning bid, in which case it will not be returned, or until the winning bidder is found unqualified to be a station licensee or has defaulted, in which case it will be returned, less applicable default payments. No interest will be paid on any down payment.

§ 21.956 Filing of long-form applications or statements of intention.

(a) Within 30 days of being notified of its status as a winning bidder, each winning bidder for a BTA service area will be required to submit either: (1) an initial long-form application for an MDS station license, along with any required exhibits; or (2) a statement of intention with regard to the BTA service area, along with any required exhibits, showing the encumbered nature of the BTA, identifying all previously authorized or proposed MDS and ITFS facilities, and describing in detail the winning bidder's plan for obtaining the previously authorized and/or proposed MDS stations within the BTA. A winning bidder that fails to submit either the initial long-form application or statement of intention as required under this section, and fails to establish good cause for any late-filed application or statement, shall be deemed to have defaulted and will be subject to the payments set forth in § 21.959(a).

(b) Each initial long-form application for an MDS station license within an auction winner's BTA service area, and each statement of intention with regard to an auction winner's BTA service area, must also include the following:

(1) FCC Form 430;

(2) an exhibit detailing the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement the winning bidder had entered into relating to the competitive bidding process prior to the time bidding was completed (*see* 47 C.F.R. § 1.2107(d));

(3) an exhibit complying with 47 C.F.R. §§ 1.2110(i) and 21.960(e), if the winning bidder submitting the long-form application or statement of intention claims status as a designated entity.

(c) Subsequent long-form applications for additional MDS station licenses within the BTA service areas of winning bidders may be submitted at any time during the five year build-out period and need not contain the exhibits specified in paragraph (b)(2)-(3) of this section.

§ 21.957 Petitions to deny against long-form applications; comments on statements of intention.

(a) Within thirty (30) days after the Commission gives public notice that a long-form application for an MDS station license submitted by a winning bidder within its BTA service area has been accepted for filing, petitions to deny that application may be filed. Any such petitions and oppositions thereto must comply with the requirements of §§ 47 C.F.R. 1.2108 and 21.30.

(b) Parties wishing to comment on or oppose the issuance of a BTA authorization issued in connection with the filing of a statement of intention by a winning bidder must do so prior to the Commission's issuance of the BTA authorization.

§ 21.958 Full payment and issuance of BTA authorizations.

Each winning bidder, except for small businesses eligible for installment payments under § 21.960(b), must pay the balance of its winning bid for its BTA service area(s) in a lump sum within five (5) business days following the release of the public notice stating that the BTA authorization(s) is ready to be issued. A winning bidder who submitted a long-form application for an MDS station license within its BTA service area pursuant to § 21.956(a) will receive its BTA authorization concurrent with the grant of its MDS conditional station license within its BTA service area. A winning bidder who submitted a statement of intention with regard to its BTA service area pursuant to § 21.956(a) will receive its BTA authorization following the Commission's review of its statement of intention. The Commission will issue a BTA authorization to a winning bidder within ten (10) business days following notification of receipt of full payment of the amount of the winning bid.

§ 21.959 Withdrawal, default and disqualification.

(a) When the Commission conducts an MDS simultaneous multiple round auction, the Commission will impose additional payment requirements on bidders who withdraw high bids during the course of an auction, who default on down or full payments due after an auction closes, or who are disqualified. The withdrawal and default payments set forth below will be deducted from any upfront payments or down payments that the withdrawing, defaulting or disqualified bidder has deposited with the Commission.

(1) *Bid withdrawal prior to close of auction.* A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid.

(2) *Default or disqualification after close of auction.* If a winning bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (1) above, plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the three percent payment will be calculated based on the defaulting bidder's bid amount.

(b) If the Commission were to conduct a sequential oral (open outcry) auction or sealed bid auction for MDS, the Commission may modify the payments set forth in paragraph (a) above to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such payments shall not exceed the payments specified in paragraph (a) above.

(1) In the case of sealed bidding:

(i) If a bid is withdrawn before the Commission releases the initial public notice announcing the winning bidder(s), no bid withdrawal payment will be assessed.

(ii) If a bid is withdrawn after the Commission releases the initial public notice announcing the winning bidder(s), the bid withdrawal payment will be equal to the difference between the high bid amount and the amount of the next highest bid. Losing bidders will only be subject to this bid withdrawal payment for a period of thirty (30) days after the Commission releases the initial public notice announcing the winning bidders.

(2) In the case of oral sequential (open outcry) bidding:

(i) If a bid is withdrawn before the Commission has declared the bidding to be closed for the BTA service area bid on, no bid withdrawal payment will be assessed.

(ii) If a bid is withdrawn after the Commission has declared the bidding to be closed for the BTA service area bid on, the bid withdrawal payment of paragraphs (a)(1) and (2) of this section will apply.

(c) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in paragraph (a)(2) above. In such event, the Commission may either re-auction the BTA service area to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

(d) A winning bidder who is found unqualified to be an MDS station licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in paragraph (a)(2) above. In such event, the Commission will generally conduct another auction for the BTA service area, affording new parties an opportunity to file applications for such service area.

(e) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the MDS competitive bidding process may be subject, in addition to any other applicable sanctions, to loss of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 21.960 Designated entity provisions for MDS.

(a) *Designated entities.* As specified in this section, designated entities that are winning bidders for BTA service areas are eligible for special incentives in the auction process. *See* 47 C.F.R. § 1.2110.

(b) *Installment payments.* Small businesses and small business consortia may elect to pay the full amount of their winning bids for BTA service areas in installments over a ten (10) year period running from the date that their BTA authorizations are issued.

(1) Each eligible winning bidder paying for its BTA authorization(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 21.955 sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable for the payments set forth in § 21.959(a)(2).

(2) Within five (5) business days following release of the public notice stating that the BTA authorization of a winning bidder eligible for installment payments is ready to be issued, the winning bidder shall pay another ten (10) percent of its winning bid, thereby commencing the eligible bidder's installment payment plan. The Commission will issue the BTA authorization to the eligible winning bidder within ten (10) business days following notification of receipt of this additional ten (10) percent payment. Failure to remit the required payment will make the bidder liable for the payments set forth in § 21.959(a)(2).

(3) Upon issuance of a BTA authorization to a winning bidder eligible for installment payments, the Commission will notify such eligible BTA authorization holder of the terms of its installment payment plan. For MDS, such installment payment plans will:

(i) impose interest based on the rate of ten (10) year U.S. Treasury obligations at the time of issuance of the BTA authorization, plus two and one half (2.5) percent;

(ii) allow installment payments for a ten (10) year period running from the date that the BTA authorization is issued;

(iii) begin with interest-only payments for the first two (2) years; and

(iv) amortize principal and interest over the remaining years of the ten (10) year period running from the date that the BTA authorization is issued.

(4) A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan.

(i) If an eligible holder making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a holder may request that the Commission permit a three (3) to six (6) month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the holder's payment history, including whether the holder has defaulted before, how far into the payment period the default occurs, the reasons for default, whether the holder has met construction build-out requirements within its BTA service area, the holder's financial condition, and whether the holder is seeking an eligible buyer. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue

to accrue and will be amortized over the remaining years of the ten (10) year payment period.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the BTA authorization will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's rules.

(5) *Unjust enrichment.*

(i) If an eligible BTA authorization holder that utilizes installment financing under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for installment payments, the holder must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(ii) If a BTA authorization holder that utilizes installment financing under this subsection seeks to make any change in ownership structure that would result in the holder losing eligibility for installment payments, the holder shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change in ownership structure as a condition of approval. Increases in gross revenues that result from revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

(c) *Reduced upfront payments.* A prospective bidder that qualifies as a small business, or as a small business consortia, is eligible for a twenty-five (25) percent reduction in the amount of the upfront payment required by § 21.954. To be eligible to bid on a particular BTA, a small business will be required to submit an upfront payment equal to seventy-five (75) percent of the upfront payment amount specified for that BTA in the public notice listing the upfront payment amounts corresponding to each BTA service area being auctioned.

(d) *Bidding credits.* A winning bidder that qualifies as a small business, or as a small business consortia, may use a bidding credit of fifteen (15) percent to lower the cost of its winning bid on any of the BTA authorizations awarded in the MDS auction.

(1) *Unjust enrichment.*

(i) If a BTA authorization holder that utilizes a bidding credit under this subsection seeks to assign or transfer control of its BTA authorization to an entity not meeting the eligibility standards for bidding credits, the authorization holder must reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, before assignment or transfer will be permitted. The amount of the required reimbursement will be reduced over time. An assignment or transfer in the first two years after issuance of the BTA authorization will result in a reimbursement of one hundred (100) percent of the value of the bidding credit;

during year three, of seventy-five (75) percent of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no reimbursement.

(ii) If a BTA authorization holder that utilizes a bidding credit under this subsection seeks to make any change in ownership structure that would result in the holder losing eligibility for bidding credits, the holder shall first seek Commission approval and must reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the authorization was awarded, as a condition of approval. The amount of the required reimbursement will be reduced over time. Such a change in ownership structure in the first two years after issuance of the BTA authorization will result in the reimbursement of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no reimbursement. Increases in gross revenues that result from revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

(e) *Short-form application certification; Long-form application or statement of intention disclosure*. An MDS applicant claiming designated entity status shall certify on its short-form application that it is eligible for the incentives claimed. A designated entity that is a winning bidder for a BTA service area(s) shall, in addition to information required by § 21.956(b), file an exhibit to either its initial long-form application for an MDS station license, or to its statement of intention with regard to the BTA, which discloses the gross revenues for each of the past three years of the winning bidder and its affiliates. This exhibit shall describe how the winning bidder claiming status as a designated entity satisfies the designated entity eligibility requirements, and must list and summarize all agreements that affect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. *See* 47 C.F.R. § 1.2110(i).

(f) *Records maintenance*. All holders of BTA authorizations acquired by auction that claim designated entity status shall maintain, at their principal place of business or with their designated agent, an updated documentary file of ownership and revenue information necessary to establish their status. Holders of BTA authorizations or their successors in interest shall maintain such files for a ten (10) year period running from the date that their BTA authorizations are issued. The files must be made available to the Commission upon request.

(g) *Audits*. BTA authorization holders claiming eligibility under designated entity provisions shall be subject to audits by the Commission, using in-house or contract resources. Selection for an audit may be random, on information, or on the basis of other factors. Consent to such audits is part of the certification included in the short-form application. Such consent shall include consent to the audit of the holders' books, documents and other material (including accounting procedures and practices), regardless of form or type, sufficient to confirm that such holders' representations are, and remain, accurate. Such consent shall also

include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business or keeping records regarding licensed MDS offerings, and shall also include consent to the interviewing of principals, employees, customers, and suppliers of the BTA authorization holders.

§ 21.961 Definitions applicable to designated entity provisions.

(a) *Scope*. The definitions in this section apply to § 21.960, unless otherwise specified in that section.

(b) *Small business; consortium of small businesses*

(1) A *small business* is an entity that together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years.

(2) *Attribution and aggregation of gross revenues*

(i) Except as specified in paragraph (b)(2)(ii), the gross revenues of the applicant (or BTA authorization holder) and its affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or holder) is a small business.

(ii) Where an applicant (or BTA authorization holder) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business.

(c) *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the preceding relevant number of calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the preceding relevant number of fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(d) The definition of an *affiliate* of an applicant is set forth in 47 C.F.R. § 1.2110(b)(4).

APPENDIX D -- DRAFT FCC FORM 304

Subject to Approval by the Office of Management and Budget

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
xxxx-xxxx
Expires xx/xx/xx

Instructions for FCC 304
Application for a Multipoint Distribution Service Authorization
(FCC Form 304 attached)

GENERAL INSTRUCTIONS

Introduction

This FCC Form is to be used to apply for a license for new Multipoint Distribution (MDS), Multichannel Multipoint Distribution (MMDS) or MDS/MMDS signal booster station, amend a pending license application, modify a granted license pursuant to 47 CFR Sections 21.40 and 21.41 and notify the Commission of station modifications pursuant to 47 CFR Section 21.42.

For Assistance

For assistance with FCC Form 304 applications, contact the MDS Section of the Mass Media Bureau at the FCC, Washington, D.C. 20554, Telephone Number (202) 416-1106.

Applicable Rules and Regulations

Before this application is prepared, the applicant should review the relevant portions of Parts 0, 1, 17 and 21 of the FCC rules in Title 47 of the Code of Federal Regulations (C.F.R.). Copies of Title 47 may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. You may telephone the GPO order desk at (202) 783-3288 for current prices. FCC rules generally require various exhibits to be filed with an application, in addition to the information requested in the application form. Applicants should make every effort to file complete applications in compliance with the Rules. Replies to questions in this form and the applicant's statements constitute representations on which the FCC will rely in considering the application. Thus, time and care should be devoted to all replies, which should reflect accurately the applicant's responsible consideration of the questions asked. Include all information called for by this application. Failure to do so can result in a dismissal or return of the application or a delay in processing the application.

English to Metric Conversions

The following English to Metric equivalents should be used to convert heights and distances, where necessary:

1 foot = 0.3048 meters
1 mile = 1.6093 kilometers

Electronic Filing
The Commission has authorized the voluntary electronic filing for new MDS applications, based on the data and other information contained in this form. The specific details concerning the method for electronically filing MDS applications, including an electronic counterpart to this paper form, will be provided through subsequent Commission public notices.

Paper Copies
All entries on the form shall be typed or legibly printed in ink. A separate application must be submitted for each MDS or signal booster station at a separate site and for each MDS channel or channel group specified in 47 CFR Section 21.901. Submit an original and one copy of the application (SIGN ORIGINAL COPY ONLY).

Incorporation by Reference
You may not incorporate by reference data, documents, exhibits, or other showings already on file with the FCC. All applicable items on this form must be answered without reference to a previous filing.

Current Information
Information filed with the FCC must be kept current. The applicant should notify the FCC regarding any material change in the facts as they appear in the application. See 47 CFR Section 1.65.

Waiver Requests
Requests for waivers of the FCC's Rules must contain an exhibit a stating reasons sufficient to justify a waiver. A separate request with the required showing must be made for each rule waiver desired, identifying the specific rule or policy for which the waiver is requested.

Exhibits
Each document required to be filed as an exhibit should be current as of the date of filing. Each page of each exhibit must be identified with the number or letter of the exhibit, the number of the page of the exhibit and the total number of pages of the exhibit. If interference studies are submitted, attach these as an exhibit.

Certificate of Completion of Construction
The applicant is reminded that upon completion of construction, an MDS licensee is required to submit a certification of construction completion and that the station is operational pursuant to 47 CFR Section 21.43. FCC Form 304A should be used to make such notification to the FCC.

INSTRUCTIONS FOR SECTION I - GENERAL AND FEE INFORMATION

Item 1. The legal name of the applicant should be the same as reported in FCC Form 430, "Licensee Qualification Report" (**See also** Section II., Item 1.) The name should also be the same as shown on any related station license or service authorization for a Basic Trading Area (BTA) or partitioned service area (PSA). The address listed may vary from that reported on FCC Form 430 if the address of the corporate officer, or other employee authorized to certify this application, differs from that of the applicant's principal office. Applicants must provide a current and valid mailing address in the United States, and this address must be that of the applicant, not the address of an equipment supplier, consultant or any third party; the authorization will be sent to this address. Failure to respond to FCC correspondance sent to the address of record may result in dismissal of an application.

Item 2. **FEE INFORMATION.** By law, the Commission is required to collect charges for certain of the regulatory services it provides to the public. Generally, MDS applicants seeking a new station license or a major change to an existing license are required to pay and submit a fee with the filing of FCC Form 304. However, governmental entities, which include any possession, state, city, county, town, village, municipal organization or similar political organization or subpart thereof controlled by publicly elected and/or duly appointed public officials exercising sovereign direction and control over their respective communities or programs, are exempt from the payment of this fee. Also exempted from this fee are long-form license applications for MDS stations to be operated in conjunction with an authorization for a Basic Trading Area (BTA) or Partitioned Service Area (PSA), which was attained directly through competitive bidding procedures. Applications for minor facilities changes or notifications pursuant to 47 CFR Sections 21.41 or 21.42 are nonfeeable. To avail itself of a fee exemption, the applicant must indicate its eligibility by checking the appropriate box in Question 2(B), Section I. FCC Form 304 applications NOT involving the payment of a fee can be hand-delivered or mailed to the FCC's Washington, D. C. offices. See 47 C.F.R. Section 0.401(a).

The Commission's fee collection program utilizes a U.S. Treasury lockbox bank for maximum efficiency of collection and processing. All FCC Form 304 applications, which require the remittance of a fee, must be submitted to the appropriate post office box address. See 47 C.F.R. Section 0.401(b). A listing of the required fee and the address to which FCC Form 304 should be mailed or otherwise delivered is also set forth in the "Common Carrier Services Fee Filing Guide" which is obtained either by writing to the Commission's Form Distribution Center, 2803 52nd Avenue, Hyattsville, Maryland 20871, or by calling Telephone No. (202) 418-FORM and leaving your request on the answering machine provided for this purpose. See also 47 C.F.R. Section 1.1104.

Payment of any required fee must be made by check, bank draft, money order or credit card. If paying by check or bank draft, make checks payable to the Federal Communications Commission, denominated in U.S. dollars, and drawn upon a U.S.

financial institution. No postdated, altered or third-party checks will be accepted. DO NOT SEND CASH. Checks dated six months or older will not be acceptable for filing. Applicants who wish to pay by money order or credit card, must submit FCC Form 159 together with their application. Payment of application fees may also be made by electronic payment, provided prior approval has been obtained from the Commission. Applicants interested in this option must first contact the Billings and Collections Branch at (202) 418-1995 to make the necessary arrangements.

Parties hand-delivering FCC Forms 304 may receive dated receipt copies by presenting copies of the applications to the acceptance clerk at the time of delivery. For mailed-in applications, a "return copy" of the application can be furnished provided the applicant clearly identifies the "return copy" and attaches it to a stamped, self-addressed envelope. Only one piece of paper per application will be stamped for receipt purposes.

For further information regarding the applicability of a fee, the amount of the fee or the payment of the fee, refer to the "Common Carrier Services Fee Filing Guide."

CLASSIFICATION OF FILING

Item 3. This item indicates whether this filing is intended as an application for a new station, a major change in an authorized station pursuant to 47 CFR Section 21.23 a minor change in authorized facilities, as defined in 47 CFR Section 21.41, a notification of facilities changes pursuant to 47 CFR Section 21.42, or an amendment to a pending application. Applications for new stations, or major or minor changes, will be assigned a new file number to the filing. Application amendments will be associated with the pending application identified in Item 5b.

Item 4. Indicate which type of protected service area is associated with this application filing. A 56.33 kilometer (35 mile) circular protected area applies to MDS licensees or conditional licensees who received prior to September 1, 1995, their initial authorization for an MDS station for which a modified license is requested herein, or an associated signal booster station. The circular area also applies to applicants using this form to amend applications on file at the Commission prior to September 1, 1995, or to modify station authorizations that were initially applied for prior to September 1, 1995. An MDS station to be operated in a Basic Trading Area (BTA), one of the six BTA-like areas or partitioned service area (PSA), as defined in 47 CFR Section 21.2, should be so indicated here and also specified in Section IV.

Item 6. Indicate whether this filing is for an MDS station, or a signal booster station pursuant to 47 CFR Section 21.913. Each MDS station signal booster at a different site requires a separate application.

Contact Representative

Item 7. This item identifies the contact representative (usually the headquarters office of a large applicant, the law firm or other representative of the applicant, or the person or company that prepared or submitted the application on behalf of the applicant). In the event there is a question concerning the application, the FCC will attempt to communicate with the contact representative first.

Certifications

Item 8. The engineering certificate must be signed by the technically qualified person responsible for preparation of the engineering information. In this context, a "technically qualified person" is a person qualified to calculate and determine the interference potential and the efficient utilization of the proposed facilities, and is thoroughly familiar with the technical requirements as specified in the applicable parts of the Commission's Rules. Except for electronically filed applications, such engineering certifications must be signed in the original for each application.

Item 9. Certification on behalf of the applicant shall be made personally by the individual applicant, a partner (if the applicant is a partnership), a corporate officer or duly authorized employee (if applicant is a corporation that has been specifically authorized to act for and on behalf of the applicant, or officer/member (if applicant is an unincorporated association). Note: The financial certification must be updated when this financial certification is no longer substantially accurate and complete.

INSTRUCTIONS FOR SECTION II - LEGAL INFORMATION

Item 1. If FCC Form 430, "Licensee Qualifications Report" has been previously filed, it need be updated only when the information presently on file with the MDS Section of the FCC's Mass Media Bureau is no longer substantially accurate and complete in all matters of decisional significance. Examples of significant types of changes which must be reported include: a change in control (*de jure or de facto*) of an applicant; a change in alien ownership or control, which is significant under § 310(a) of the Communications Act; or any conviction or administrative finding required to be reported under item 7 of FCC Form 430.

Items 6. - 9. These items apply only to applicants who have attained a BTA, one of the six additional BTA-like areas, or a partitioned service area directly through the competitive bidding procedures. Applicants who have already submitted the information called for by these items, by filing a Statement of Intent, may omit these items.

INSTRUCTIONS FOR SECTION III - PURPOSE OF FILING

Item 1. Applicants should enter in alphabetical order one or more letters corresponding to the listed purposes of this filing; i.e., a request for authorization of a new station or request for authority to make various modifications to an authorized station, or notification of facilities modifications already made where specific FCC authorization is not required. Describe in an exhibit facilities changes or other purposes not listed in this item.

INSTRUCTIONS FOR SECTION IV - STATION LOCATION INFORMATION

Item 1. This item indicates the nature of an action regarding transmitting antenna site coordinates. Applicants may use this form to correct the geographic coordinates of their antenna site. However, a discrepancy of more than 10 seconds in site latitude, longitude or both requires the filing of a major change application.

Items 2 - 5. These items identify the antenna site by its address, or if there is no address, by a brief description of the location such as a distance and direction from known landmarks, city or town, county and state. If not located in a city or town, insert the name of the nearest identifiable community.

Item 6. This item is the geographic coordinates of the location of the transmitting antenna site. Items 6a. and 6b. are the North Latitude and West Longitude, respectively, with reference to North American Datum of 1927 (NAD27). Specify South Latitude and East Longitude where applicable; otherwise, North Latitude and West Longitude will be presumed. Geographic coordinates should be rounded off to the nearest second; e.g., 29.5' is rounded to 30'. The National Geodetic Survey is in the process of replacing NAD27 with the more accurate 1983 North American Datum (NAD83) and updating current topographic maps with NAD83 datum. In addition, coordinates determined by use of the satellite-based Global Positioning System already reflect the NAD 83 datum. To prevent intermixing of data using two different datum, however, the Commission announced that until further notice, applicants are to furnish coordinates based on NAD27 datum on all submissions and the Commission will continue to specify NAD27 coordinates in its data bases and authorizations. In addition, applicants who have already filed applications with coordinates that reflect NAD 83 datum must provide NAD27 coordinates to the appropriate Commission licensing bureau. See Public Notice, entitled "FCC Interim Procedures for the Specification of Geographic Coordinates," 3 FCC Rcd 1478 (1988).

Item 7. This item reports the ground elevation of the transmitting site in meters above mean sea level.

Item 8. This item keys to location data in the data base that is to be replaced by the data in Items 2 - 6. The filer should complete this item only if (1) correcting geographical coordinates or (2) relocating the pertinent facilities at the location indicated by this item to the location specified in Items 2 - 6.

Item 9. **Quiet Zone**. Quiet zones are those areas where it is necessary to restrict radiation so as to minimize possible impact on the operations of radio astronomy or other facilities that are highly sensitive to radio frequency interference. The protected areas involved and procedures required are given in 47 CFR Section 21.113.

Item 10. **Environmental Policy**. Each applicant should check the appropriate box to indicate whether a Commission grant of the proposed communications facility(ies) may or may not have a significant environmental impact as defined by 47 C.F.R. Section 1.1307. Briefly, Commission grant of an application may have a significant environmental impact if any of the following are proposed:

(a) A facility is to be located in sensitive areas (e.g., an officially designated wilderness area, a wildlife preserve area, a flood plain) or will physically or visually affect sites significant in American history.

(b) A facility whose construction will involve significant changes in surface features.

(c) The antenna tower and/or supporting structure(s) will be equipped with high intensity white lights and are to be located in residential neighborhoods.

(d) The facilities or the operation of which will cause exposure of workers or the general public to levels of radio frequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95. 1-1982), by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, New York 10017.

NOTE: In answering this question, applicants for MDS signal booster stations and MDS stations which transmit with an equivalent isotropically radiated power (EIRP) of 200 watts or less are excluded from the standards set forth in subparagraph (d) above. However, in determining the appropriate response to this question, such applicants must still perform an analysis of the subject facilities in the context of the matters set forth in subparagraphs (a) - (c) above.

If you answered No, a brief statement explaining the reasons why there will not be a significant environmental impact must be submitted. With respect to RF radiation exposure, the required statement must include a description of the steps that have been taken to protect the general public, station employees, and other persons authorized access to the tower from exposure to RF radiation levels in excess of the specified safety standards and that these steps comply with those required by OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation." The applicant must take into account ALL non-excluded transmitters at and around the station's transmitter site; that is, contributions to environmental RF levels from all nearby radio and television stations, not just the applicant's station, must be considered.

If you answered Yes, submit the required Environmental Assessment (EA). The EA includes for antenna towers and satellite earth stations:

(a) A description of the facilities, as well as supporting structures and appurtenances, and a description of the site, as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(b) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by, zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect.

(c) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

(d) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects; and any alternative sites or facilities which have been or might reasonably be considered.

The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission, after an independent review of the EA, to reach a determination concerning the proposal's environmental impact, if any. The EA shall deal specifically with any feature of the site which has special environmental significance (e.g., wilderness area, wildlife preserve, natural migratory paths for birds and other wildlife, and sites of historic, architectural or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed in the National Register of Historic Places, 39 Fed. Reg. 6402 (February 19, 1974). It shall also detail any substantial change in the character of the land utilized (e.g., deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (e.g., necessitated by the operation and maintenance of the facilities).

The EA shall also be accompanied with evidence of site approval which has been obtained from local or federal land use authorities.

To the extent that such information is submitted in another part of the application, it need not be duplicated in the EA, but adequate cross-reference to such information shall be supplied.

An EA need not be submitted to the Commission if another agency of the Federal Government has assumed responsibility: (a) for determining whether the facilities in question will have a significant effect on the quality of the human environment and, (b) if it will affect the environment, for invoking the environmental impact statement process.

Protected Service Area

Item 11. Indicate in this item the nature of the protected service area. Individual stations licensed in conjunction with a BTA or PSA authorization do not have individually associated service areas; rather, the service area is that of the BTA or PSA. A BTA service area must include all the counties in that BTA as defined in the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, pp. 36-39. Upon the removal of any portion of a BTA through partitioning, the remaining area is no longer a BTA but, itself, becomes a partitioned service area, defined by its counties or other recognized geopolitical subdivisions.

Item 12. If the proposed MDS station or signal booster station is not licensed in conjunction with a BTA or PSA authorization, but rather is associated with an "incumbent" MDS license, conditional license or application, give the geographic coordinates of the center of the fixed 56.33 kilometer (35 mile) circular protected service area. On September 1, 1995, the center coordinates of the circular protected areas became fixed at the then-authorized and/or previously proposed coordinates.

Item 13. This item must be answered only if the filing is for a station licensed in conjunction with a BTA authorization, including the six additional BTA-like areas defined by the Commission. BTA market designators and market names are listed in FCC Public Notices or in the FCC Record.

Item 14. This item must be answered only if the filing is for a station licensed in conjunction with an authorization for a partitioned service area (PSA). Identify each contiguous county or other recognized geopolitical subdivision in the space provided. If more space is needed, continue the description in an exhibit. Applicants not using electronic filing procedures may also submit a map depicting the PSA, if so desired.

INSTRUCTIONS FOR SECTION V. TRANSMITTING ANTENNA INFORMATION

Item 1. This item specifies numbers used to later-identify (Section VI., Item 8) the antennas described in Items 2 - 4, below. It serves no other purpose. A separate number is used to identify each different type of antenna to be included in a multiple-antenna array. Most MDS stations employ a single transmitting antenna, which entails completing only the leftmost column for items 2 - 4. This application form also accommodates the use of multiple antenna arrays, where the array is treated as a single entity. All antennas in the array must operate from the same site. The antenna array must have a single antenna radiation center height above ground and a "composite" horizontal plane radiation pattern, based on the superposition of the fields of its individual antennas, regardless of the degree of electrical coupling between the antennas. If more than one identical antenna is to be used in an array, these antennas need only be identified once; i.e., by one number in Item 1.

Items 2 - 3. These items describe an antenna(s) by its manufacturer and model number and must be completed regardless of whether a directional or omnidirectional antenna is being proposed. Manufacturer is the name of the company that made the antenna, and model number is the designation that the manufacturer assigns to the antenna.

Item 4. For a directional antenna in the horizontal plane, indicate the total beamwidth between the 3 dB (or 1/2 power) points in the major radiation lobe of the antenna or enter "omni" for an omnidirectional antenna; i.e., an antenna with an approximately circular radiation pattern. **Note:** 47 CFR Section 21.904, provides a formula for relating the antenna beam width and the maximum permissible effective isotropic radiated power (EIRP). For multiple antenna systems, the maximum permissible EIRP is that allowed for an omnidirectional antenna if the composite horizontal radiation pattern is approximately circular. Otherwise, the maximum EIRP in a main horizontal lobe is determined by the beam width of the dominant antenna in the array that produces that lobe.

Item 5. This item specifies the horizontal radiation pattern of a directional antenna or multiple-antenna array in terms of a tabulation of relative field strengths, which are used to calculate corresponding values for the amount of power radiated in different azimuths. If a single omnidirectional transmitting antenna is proposed, Item 5. is not applicable and may be omitted. If a single directonal antenna is proposed and the antenna manufacturer and model number are included in the Commission's list of common "off-the-shelf" directional antennas (periodically released by Public Notice), so indicate in Item 5b. and omit the tabulation of relative field strengths. Otherwise, tabulate the horizontal radiation pattern in Item 5d. by entering relative field strengths for the 36 azimuths given in the table. **For single antennas**, the radiation pattern must be entered in a "**normalized**" fashion, the method antenna manufacturers normally use to depict "polar diagrams" of horizontal radiation patterns. In a normalized radiation pattern, the antenna's main lobe, (or one of the main lobes where the relative field strength has a value of 1.0) is always pointed at True North, which is

an azimuth of 0 degrees. Starting at True North, give the relative field strengths at 10 degree intervals, proceeding clockwise around the radiation pattern. The FCC antenna data base allows for relative field strengths at ten additional azimuths, as selected by the applicant (the last set of columns in Item 5d.). Applicants should enter the azimuths corresponding to the maximum and minimum values of (normalized) relative field strengths for the antenna, if these azimuths are not a multiple of 10 degrees.

Where two or more transmitting antennas are used, the applicant must tabulate in Item 5d. the "composite" horizontal radiation pattern, regardless of the degree of electrical coupling between the antennas. For composite antennas, applicants may not refer to a composite pattern already "on file" in another MDS application or station authorization, nor a composite pattern contained in the FCC's directional antenna data base. Unlike the case of the normalized tabulation for a single antenna, complete the table in Item 5.d by entering the "**unnormalized**" relative field strengths of the composite antenna radiation pattern; i.e., the actual horizontal radiation pattern that will exist once the station is placed in operation. For example, if the antenna's main lobes are at azimuths of 40 and 220 degrees, enter in the table a relative field strength value of 1.0 at azimuths of 40 and 220 degrees, etc. Applicants should enter the azimuths corresponding to the maximum and minimum values of unnormalized relative field strengths for the antenna, if these azimuths are not a multiple of 10 degrees.

INSTRUCTIONS FOR SECTION VI.- REQUESTED TRANSMITTING FACILITIES

Item 1. This item specifies the channel(s) and any associated visual carrier frequency offset(s) for the proposed station operation. Allowable offsets are "+" (plus) and "-" (minus). For example, an applicant requesting use of the E-channel group with a plus (+) offset would enter the following: E1[+] E2[+] E3[+] E4[+]. An applicant would specify MDS channel 1 with no offset as: 1[ ], leaving the offset box empty. **Note**: Operation on the basis of a 10 kHz frequency offset requires that two cochannel stations operate with different visual carrier offsets, that the related transmitters meet the prescribed frequency tolerances in 47 CFR Section 21.101 and that the affected parties have agreed in writing to operate on the basis of frequency offset and that this application includes a statement to that effect, signed by both parties. By specifying a frequency offset, an applicant acknowledges compliance with these requirements, or is submitting with this application a request for waiver of the MDS interference protection standards, supported by full engineering justification.

Item 2. This item specifies the emission designators for the transmitter, which is normally the same as the type accepted/notification values. The visual and aural emission designators for the transmission of standard television signals are 5M75C3F and 250KF3E, respectively.

Item 3. This item specifies the polarization of transmitting antenna(s); enter "H" for horizontal polarization or "V" for vertical polarization. This application form and the FCC data base provide for a single polarization for each transmitting facility. Proposed use of any other type of polarization should be described in an exhibit.

Item 4. This item specifies the height of the antenna center of radiation above ground (in meters) which, together with the ground elevation of the site, is used in determinations of signal path obstructions.

Item 5. This item specifies the maximum effective isotropic radiated power (EIRP) in the horizontal plane, expressed in decibels above one watt (dBW). The specified EIRP should be that corresponding to an angle of zero degrees in the transmitting antenna's vertical radiation plane, regardless of whether or not antenna beam tilt is used. To calculate the EIRP in dBW, take the logarithm to the base ten of the transmitter output power (in watts), multiply by ten, add to the result the antenna gain (in dbi) and then subtact the sum of the losses from transmission line and other devices to be inserted between the transmitter and antenna (in dB). To convert EIRP from units of watts to dBW, take the logarithm to the base ten of the EIRP in watts and multiply the result by ten. **Note**: Applicants proposing to locate MDS stations or signal boosters within 80.5 kilometers (50 miles) of the Canadian or Mexican borders should attach an exhibit which specifies the maximum EIRP in the vertical plane, reflecting the use of antenna beam tilt, if applicable.

Item 7. Indicate whether the antenna is directional or omnidirectional in the horizontal plane and specify the amount of nonstandard antenna beam tilt, if any, accurate to the nearest 1/10th of a degree; i.e., beam tilt in addition to that incorporated into the antenna design. Beam tilt is not a factor in MDS interference calculations performed by the FCC staff in application acceptance studies, but will appear on MDS station licenses. For directional antennas in the horizontal plane, specify the azimuth orientation of the major lobe(s) of radiation in degrees clockwise from True North ("orientation of the main lobe".) In FCC computerized interference studies, the normalized relative fields of the antenna (Section V, Item 5.) are "rotated" by this angle in order to calculate the power radiated for 360 equally spaced radial azimuths. **Note**: Do not enter for this item the orientation of the line of symmetry between major radiation lobes.

Item 8. This item applies only to applications proposing the use of multiple tansmitting antennas. Indicate the azimuth of the major horizontal radiation lobe(s), degrees clockwise from True North, of each individual antenna in the system, usually also reflecting the physical orientation of the antenna. Use the antenna numbers (Section V., Item 1) to identify the individual antennas. For example, a proposed array consisting of two identical antennas radiating equal power, one pointed North, the other South, would be specified as follows:

	Antenna No.	Azimuth of Main Lobe(s)
First antenna	1	0
Second antenna	1	180
Third antenna		
Composite antenna array	***	0, 180

Note 1: Applications proposing to locate MDS transmit or signal booster stations within 80.5 kilometers (50 miles) of the Canadian or Mexican border must provide in an exhibit the following additional information about their proposed facilities: (a) transmitter peak visual output power (watts), transmitting antenna gain (dBi) and transmission system losses (dB); e.g., losses due to transmission line, diplexers, combiners, etc. This additional data is needed to meet international notification requirements.

Note 2: An indication as to the specific transmitter make and model is not required on the application. Rather, in filing a Certificate of Completion of Construction, an MDS licensee must certify that it has installed a transmitter that has been type accepted by the FCC for use in the MDS service pursuant to 47 CFR Sections 21.120. See also 47 CFR Section 21.908.

INSTRUCTIONS FOR SECTION VII. - ANTENNA STRUCTURE DATA

Item 1. The term "new" applies to the proposed construction of a new antenna structure or the use of a structure which contains no FCC licensees of any kind. The term "existing" applies to any structure with an antenna which is presently utilized by an existing FCC licensee(s).

Item 2. If item 1 is "Existing", enter the call sign of one existing FCC licensee using the structure and the radio service for that call sign.

Item 3. See antenna figure examples on the lower portion of this page. Indicate the number of the figure which most resembles your antenna structure. In item 3a., enter the type of supporting structure on which the antenna is or will be mounted (e.g., building, tower, tank, silo, building/tower, etc.) In item 3b., enter the height above ground in meters, to the highest point of the supporting structure only. For instance, if the antenna structure consists of a building/tower combination, include any elevator shaft, flag pole, or penthouse in the support structure height, but not the antenna,

tower, pole or mast. If the antenna structure is a tower only, include the height of the tower, but not the antenna. Refer to letter "b" in the antenna figure examples below. In item 3c., enter the overall height above ground in meters, of the entire antenna structure to the highest point, including any appurtenances. You must include antennas, dishes, or obstruction lighting. Refer to letter "d" in the antenna figure examples below.

Item 4. Enter the FCC assigned tower number if the tower is existing and the number is known.

Item 5. You must notify the Federal Aviation Administration on FAA Form 7460-1 (obtainable from any FAA office), with certain limited exceptions as set forth in Part 17 of the FCC Rules and Part 77 of the FAA Rules, of any of the following construction or alterations of an antenna structure:

(1) Construction of any new structure or alteration of any existing structure, which would result in the top of the antenna or the antenna structure exceeding a height of 61 meters (200 feet) above ground level at the antenna site.

(2) Construction of any new structure or alteration of any existing structure, which would result in the top of the antenna or the antenna structure exceeding the height of an imaginary surface extending outward and upward at one of the following slopes:

(a) 1 meter above the airport elevation for each 100 meters from the nearest runway longer than 1 kilometer within 6.1 kilometers of the antenna structure, excluding helicopter and seaplane bases with specified boundaries, if that airport is either listed in the Airport Directory of the current Airman's Information Manual or is operated by a Federal military agency.

(b) 2 meters above the airport elevation for each 100 meters from the nearest runway shorter than 1 kilometer within 3.1 kilometers of the antenna structure, excluding helicopter and seaplane bases with specified boundaries, if that airport is either listed in the Airport Directory or is operated by a Federal military agency.

(c) 4 meters above the airport elevation for each 100 meters from the nearest landing and takeoff area within 1.5 kilometers of the antenna structure of each heliport listed in the Airport Directory or that is operated by a Federal military agency.

(3) Any construction of an antenna structure (or any alteration of an antenna structure that would increase its height) on an airport listed in the Airport Directory of the current Airman's Information Manual.

4) When requested by the FAA, any construction or alteration that would be in an instrument approach area (defined in the FAA standards governing instrument approach procedures) and available information indicates it might exceed an obstruction standard of the FAA.

If you intend to install towers of unusual height or at locations in close proximity to aircraft landing areas, it will be to your advantage to discuss the location and height of the antenna in detail with the appropriate FAA area office before filing your application.

Item 6. If a Notice of Construction or Alteration has been filed with the FAA, enter "Y". If a Notice of Construction or Alteration has not been filed, enter "N". If "Y" (yes), enter the date filing was made with the FAA and the name of the regional FAA office where the filing was made. Also enter the FAA assigned Aeronautical Study Number, if known.

INSTRUCTIONS FOR SECTION VIII. - INTERFERENCE ANALYSIS AND NOTIFICATION REQUIREMENTS

The Commission's Rules require MDS applicants to perform certain analyses of the potential for causing harmful interference to authorized or previously proposed MDS and ITFS facilities and to serve these studies on affected licensees, conditional licensees, and/or applicants, together with a copy of this application form and related exhibits. Interference analyses do not have to be submitted with MDS applications filed at the FCC, although applicants may do so. In lieu of performing the required analyses, an applicant may submit a written statement(s) of "no objection" to the operation of the proposed station, signed by the licensee(s), conditional licensee(s) or applicant(s) whose facility(ies) otherwise must be included in the interference analyses. The Commission Rules also provide for notification of BTA and PSA authorization holders of the areas adjoining an applicant's protected service area. Before filing an application, an applicant should carefully review the rules governing interference protection, analysis and/or notifications, and the limiting MDS signal strength. These are contained in 47 CFR Sections 21.901, 21.902, 21.913, 21.937, and 21.938.

Items 1. - 6. of this section are the applicant's declaration of compliance with all required interference and signal strength analyses and/or notifications on or prior to the date of filing this application. Applicants are reminded that any such analyses or agreements must be available to the Commission, upon request. The Commission may also request evidence that an applicant properly notified MDS licensees or authorization holders.

FCC 304

FEDERAL COMMUNICATIONS COMMISSION

Approved by OMB
xxxxxxx
Expires dd/mm/yy
Est. Avg. Burden Hours
Per Response: ## Hrs.

Application for a Multipoint Distribution Service Authorization

FCC Use Only
(File Number)

Fee Use Only

Section I. General and Fee Information

1. Legal Name of Applicant		Telephone Number ( )
Mailing Street Address or P.O. Box ATTENTION:		
City	State	Zip Code
Call Letters	Other FCC identifier (if applicable)	

2. A. Is a fee submitted with this application? [ ] Yes No
B. If "No", indicate reason for fee exemption (see 47 CFR Section 1.1112 and go to Question 3.

[ ] Government Entity [ ] BTA or PSA Authorization Attained Directly Through Competitive Bidding

or

[ ] Nonfeeable Application

C. If "Yes", provide the following information:

(a) Fee Type Code	(b) Fee Multiple	(c) Fee Amount	(d) Fee Payor ID	FCC USE ONLY
		$		

CLASSIFICATION OF FILING

3. This filing is for a (an) (check one)
   - [ ] New station authorization
   - [ ] Major change to authorized station
   - [ ] Minor change pursuant to 47 CFR § 21.41
   - [ ] Notification pursuant to 47 CFR § 21.42
   - [ ] Major amendment to pending application
   - [ ] Minor amendment to pending application

4. The proposed station is associated with which type of protected service area? (check one)
   - [ ] Basic Trading Area (BTA) or partitioned service area (PSA)
   - [ ] Circular protected area, 56.33 kilometers (35 mile) radius

5. a. If filing references an existing station: call letters of existing station:	b. If filing amends a pending application: File number of pending application:

6. Type of station: (check one) [ ] MDS station [ ] Signal booster station

CONTACT REPRESENTATIVE

7. Name of Contact Representative (if other than applicant)		Telephone Number ( )
Firm or Company Name		
Mailing Street Address or P.O. Box		
City	State	Zip Code

8. **Certification of Person Responsible for Preparing Engineering Information Submitted in this Application.**

I certify that I am responsible for the preparation of the engineering information contained in this application, that I am familiar with Part 21 of the Commission's Rules and have either prepared or reviewed the engineering information submitted in this application, and that it is complete and accurate to the best of my knowledge.

Date	Type or Print Name of Person Certifying	Signature
Firm or Company Name		
Mailing Street Address or P.O. Box		City
State	Zip Code	Telephone Number (Area Code) ( )

9. **Certifications of Applicant**

Except for applicants for stations to be licensed in conjunction with an authorization for a Basic Trading Area (BTA) or partitioned service area (PSA), the applicant certifies that it has, or has reasonable assurance that it will have, the ability to meet the expected costs of constructing the facility within the construction permit period and the estimated operating expenses for twelve months and that the proposed station site will be available to the applicant for timely construction of the facilities during the initial construction period. I am familiar with Part 21 of the Commission's Rules and have either prepared or reviewed the information submitted in this application. The applicant waives any claim to the use of any particular frequency of the electromagnetic spectrum as against the regulatory power of the United States because of previous use of the same, whether by license or otherwise, and requests a construction authorization in accordance with this application. All statements made in the attached exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that the statements made in this application are true, complete and correct to the best of the signer's knowledge and belief, and are made in good faith.

By checking "Yes", below, the applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits, that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual applicant (e.g., a corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that section. For the definition of a "party" for these purposes, see 47 CFR Section 1.2002(b).

[ ] Yes [ ] No

Failure to check "Yes" may cause dismissal of your application.

Date	Applicant (Must correspond with that shown on Page 1)	Type or Print Name of Person Signing
Signature		Title (Position Held by Person Signing)

Section II. Legal Information

1. **Licensee Qualification Report**: Does the applicant have a current "Licensee Qualification Report," FCC Form 430, on file for the MDS service? If "No", that form must be completed and submitted with this application. If "Yes", indicate the date of such filing with the MDS Section of the Video Services Division of the Mass Media Bureau: _____	[ ] Yes No
2. Applicant proposes service as a [ ] Common Carrier [ ] Non-common Carrier	

OWNERSHIP AND CONTROL OF FACILITIES

3. Are there any agreements or understandings existant or under negotiation which affect the ownership or control of the facilities proposed herein, or any right or interest therein by any person not party to this application? If "Yes", submit an exhibit explaining such understanding or agreements.	[ ] Yes No
4. Are there any agreements or understandings existant or under negotiation which affect the management or operation of the facilities proposed herein? If "Yes", submit an exhibit demonstrating how the applicant will retain control over the facilities and certifying compliance with 47 CFR Section 21.13(g).	[ ] Yes No
5. Does this application propose a new or modified station for which there is an ownership interest in, control by, affiliation with, or leasing arrangement with a cable television company? If "Yes", submit an exhibit describing the relationship with the cable company and a map or narrative depicting the overlap, if any, of the boundaries of the cable franchise area and MDS protected service area.	[ ] Yes No

INITIAL LONG-FORM APPLICATION OF AUCTION WINNERS ONLY

6. (a) Is this the initial long-form application for an MDS station within an auction winner's BTA service area; i.e., the first station to be licensed in this BTA to the auction winner?	[ ] Yes No
(b) If "Yes", has the applicant previously filed a Statement of Intent regarding this BTA?	[ ] Yes No
If this is the initial long-form application and the applicant has not previously filed a Statement of Intent, the applicant must submit the information specified in Questions 7, 8 and 9 of this section.	
7. Submit an exhibit pursuant to 47 CFR Section 1.2107(d) detailing the terms and and conditions and parties involved in any bidding consortia, joint venture, partnership or other arrangement the applicant had entered into relating to the competitive bidding process.	
8. Submit an exhibit pursuant to 47 CFR Section 21.956 providing information on the applicant's subsidiaries, affiliates, significant stockholders, and partners, if any.	
9 . Does the applicant claims status as a designated entity? If "Yes", submit an exhibit pursuant to 47 CFR Sections 1.2110(i) and 21.962(c) describing how the applicant satisfies the designated entity eligibility requirements, summarizing all agreements that affect designated entity status, and disclosing specified revenue and net worth information.	[ ] Yes No

Section III. **PURPOSE OF FILING**

1. The purpose of this filing is to: [ ]

Enter one or more letters that correctly describes the purpose of this filing.

A. request authorization for new station
B. request authority to add channel(s) to an E- or F- group authorization
C. request authority to change channel(s) within an authorized E- or F- group
D. request authority to relocate transmitting site
E. request authority to increase EIRP by more than 1 dB in any direction
F. request authority to increase antenna radiation center height above ground
G. request authority to increase overall height of antenna structure
H. request authority to change antenna polarization
I. request authority to change transmitter emission type or bandwidth

J. change antenna horizontal radiation pattern
K. change azimuth of main horizontal lobe of radiation
L. add or change visual frequency offset
M. decrease EIRP
N. change antenna radiation center height by less than 1.5 meters
O. increase overall height of antenna to a height of 6.1 meters or less above ground or building
P. decrease overall height of antenna structure
Q. delete a channel(s)
R. other facilities changes (submit exhibit explaining changes)
S. correct erroneous information on license not involving a major change pursuant to 47 CFR § 21.23 (submit exhibit if nature of correction(s) is not listed here.)

Section IV. Station Location Information

ANTENNA SITE LOCATION

1. Action requested [ ] Add new station [ ] Move location [ ] Correct coordinates (check one)

2. Street address or other description of antenna site

3. City:	4. State:	5. County:

6. Transmitting antenna site coordinates

a. North latitude (DD-MM-SS)	b. West longitude (DD-MM-SS)	7. Ground elevation above mean sea level (meters)
___ __ ' __ "	___ __ ' __ "	

8. If changing antenna location or correcting antenna site coordinates, give coordinates of the site being changed or corrected. Note: Correction of site latitude or longitude or both by more than 10 seconds is a major change in authorized facilities.

a. North latitude (DD-MM-SS)	b. West longitude (DD-MM-SS)
___ __ ' __ "	___ __ ' __ "

9. **Quiet Zone**: Does this application propose to construct or modify a station in any "quiet zone" area where radio use is restricted? If "Yes", give the name of authority notified and date of notification. [ ] Yes No

a. Authority notified:	b. Date of notification:

10. **Environmental Policy**: Would a Commission grant of any proposal in this application or amendment have a significant environmental effect as defined by 47 CFR 1.1307? If "Yes", submit with the application the environmental assessment required by 47 CFR §§ 1.1308 and 1.1311. If "No", give a brief explanation of why there will not be a significant environmental effect (submit an exhibit if more space is necessary). [ ] Yes No

PROTECTED SERVICE AREA

11. The protected service area associated with the proposed station is a: (Check one)

[ ] Circle with radius of 56.33 km (35 miles)
[ ] Basic Trading Area (BTA) or one of the six additional BTA-like areas
[ ] Partitioned service area (PSA)

Note: By definition, a BTA authorization must include all counties of that BTA; i.e., no counties of a BTA have been partitioned to another entity. Upon the removal of any portion of a BTA through partitioning, the remaining area is no longer a BTA, but, itself, becomes a partitioned service area.

12. **For application proposals associated with a 56.33 km (35 mile) protected service area**, enter the geographic coordinates of the center of of the authorized circular protected service area. **Caution**: The center coordinates may not coincide with the antenna site coordinates if the site has been, or is herein proposed to be relocated.

a. North latitude (DD-MM-SS) ___ ___ ' ___ "

b. West longitude (DD-MM-SS) ___ ___ ' ___ "

13. **For applications proposing to locate the transmitting antenna site in a Basic Trading Area (BTA):**

BTA Numerical Designator	BTA Name (city/state)

14. **For applications proposing to locate the transmitting antenna site in a partitioned service area (PSA),** identify the contiguous counties and/or other political subdivisions that comprise the PSA in which the proposed antenna site will be located. A map depicting the PSA may be submitted, but is not required.

Section V. Transmitting Antenna Information

1. Antenna Number:	1	2	3
2. Manufacturer:			
3. Model Number:			
4. Beam Width: (or "omni")			

5. Tabulation of horizontal relative field strengths for a directional antenna or array.

a. The station at this site will use: [ ] a single antenna [ ] multiple antennas

b. **For single transmitting antenna systems,** is the horizontal radiation pattern for this antenna already tabulated in the FCC's directional antenna data base? [ ] Yes No If "No", enter in Question 5.d., values for the normalized horizontal relative field strengths for this antenna. Refer to the instructions for guidance.

c. **For multiple transmitting antenna systems,** tabulate in Question 5.d., values for the horizontal plane relative field strengths for the "composite" antenna system. Give the non-normalized (i.e., actual) relative field strength corresponding to each specified azimuth.

d.

Required Azimuths						Optional Azimuths	
Azimuth	Rel Field	Azimuth	Rel Field	Azimuth	Rel Field	Azimuth	Rel Field
0		120		240			
10		130		250			
20		140		260			
30		150		270			
40		160		280			
50		170		290			
60		180		300			
70		190		310			
80		200		320			
90		210		330			
100		220		340			
110		230		350			

Section VI. Requested Transmitting Facilities

1. Channel [offset]: __[ ] __[ ] __[ ] __[ ]

2. Emission Designator. Visual: [ ] Aural: [ ] 3. Polarization: ___

4. Antenna Radiation Center Height Above Ground: ____ meters

5. Equivalent Isotropically Radiated Power: _____ dBW

6. Transmitting Antenna System: [ ] Single Antenna or [ ] Multiple Antennas

7. **Data for a Single Transmitting Antenna System**
   (a) Antenna Type: [ ] Omnidirectional or [ ] Directional

   (b) If Directional, Azimuth of Main Horizontal Lobe: ____ (c) Beam Tilt __.__

8. **Data for a Multiple ("Composite") Transmitting Antenna System**
   Give the main lobe azimuth(s) (clockwise from True North) of the each separate antenna in the multiple antenna array, and also give the main lobe azimuth(s) of the composite horizontal plane radiation pattern resulting from the combined use of these antennas Use the antenna numbers in Section V. that correspond to each different antenna in the array. For example, if the array consists of two identical antennas, the number 1 would be entered in the Antenna No. column for both the first and second antenna.

	Antenna No.	Azimuth of Main Lobe(s)
(a) First antenna		
(b) Second antenna		
(c) Third antenna		
(d) Composite antenna array	******	

Section VII. Antenna Structure Data

1. Structure is [ ] New [ ] Existing	2. Existing station using structure a. Call sign: b. Radio service:
3. Figure number (1, 2, or 3) of figures below which most resembles the structure: __ a. Structure type: b. Height of support structure ("b" in figures): _____ meters c. Overall height of structure ("d" in figures): _____ meters	
4. FCC tower no. (if known):	5. Is FAA notification required? [ ] Yes No
6. If "Yes", FAA notified? [ ] Yes No	
a. Date FAA notification filed:	b. FAA regional office (city/state):
c. FAA study number (if known):	
d. If required FAA notification has not been made, briefly explain below.	

Figure 1

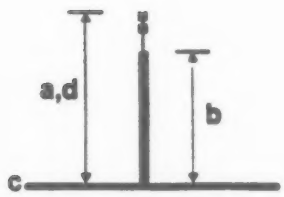


Figure 2

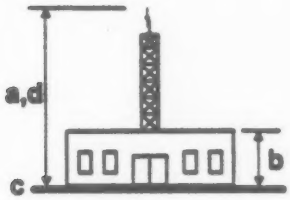
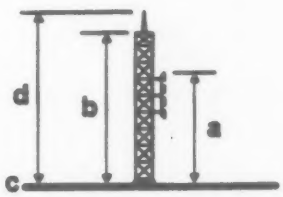


Figure 3



a = height to tip of antenna (AGL)

b = height of support structure (AGL)

c = ground elevation (AMSL)

d = overall height of structure including all appurtenances (AGL)

Section VIII. Interference Analysis and Notification Requirements

1. The applicant has met the following requirement to: (a) Prepare an analysis of the potential for harmful interference from its proposed facilty to the protected service area of all authorized and previously proposed "incumbent" MDS stations, for which the geographic coordinates of the center of the protected 56.33 kilometer (35 mile) circular areas are located within 160.94 kilometers (100 miles) of the proposed MDS station antenna site, [or 80.47 kilometers (50 miles) of a proposed signal booster site], and which operate or propose to operate on the same channel or an adjacent channel or, in lieu of an interference analysis to a particular station(s), (b) The applicant has previously filed or is filing with this application a written statement(s) of "no objection" to the operation of the proposed station from the licensee(s), conditional licensee(s) and/or applicant(s). (See 47 CFR Sections 21.902 and 21.937.)	[ ] Yes No
2. The applicant certifies that it has, on or before the date of submission of this application, served the above-referenced interference analyses, together with a copy of this application, on all "incumbent" MDS licensees, conditional licensees and/or applicants for which a written statement of "no objection" has not been submitted.	[ ] Yes No
3. The applicant certifies that it has, on or before the date of submission of this application: (a) Served written notice of this filing, including a copy of this application, on all authorization holders for an adjoining BTA or partitioned service area, provided the proposed facilities would produce an unobstructed electromagnetic signal path to any location within an adjoining BTA or partitioned service area or, alternatively, (b) Has previously filed or is filing with this application a written statement(s) of "no objection" to the operation of the proposed station from the applicable service authorization holders. Note: These notification or consent provisions do not apply to an MDS authorization holder or licensee with respect to an adjoining area authorized to the same entity.	[ ] Yes No

4. The applicant has prepared an analysis, which demonstrates that: (a) The proposed MDS station or signal booster would not produce a free space power flux density greater than - 73 dBW/m^2 at any point on the boundary of its protected service area for which there is an unobstructed electromagnetic signal path to the transmitting antenna or, alternatively, that (b) It has filed or is filing with this application, a written statement(s) of "no objection" to the operation of the proposed facility from authorization holders of an adjoining BTA or partitioned service area, permitting the power flux density to exceed the limiting value at the boundary.	[ ] Yes No
5. The applicant has prepared an analysis, which demonstrates that: (a) The proposed MDS station or signal booster would not cause harmful interference to any authorized E-, F-, G- or D-channel ITFS station with a transmitter site within 80.5 kilometers (50 miles) of the site coordinates of the proposed station or, alternatively, that (b) It is submitting with this application, a written statement(s) of "no objection" to the operation of the proposed station from the ITFS licensees and/or permittees pursuant to 47 CFR Section 21.902(i).	[ ] Yes No
6. The applicant certifies that it has, on or before the date of submission of this application, served the interference studies and a copy of this application on all ITFS licensees and permittees for which a written statement of "no objection" is not submitted with this application.	[ ] Yes No

Section IX. Other Information

1. The applicant has entered into an agreement(s) to operate the proposed station on the basis of visual carrier frequency offset with respect to one or more authorized stations or pending applications. If "Yes", submit an exhibit that identifies the parties with whom an offset agreement has been reached; include the name of the licensee, conditional licensee or applicant, station location, channel(s), frequency offsets ("+" or "-") and the call sign or application file, if known. Also include a signed statement from each affected licensee, conditional licensee or applicant who agrees to operate on the basis of frequency offset. [ ] Yes No

2. In addition to the other interference analysis and/or notification requirements, **an applicant for an MDS signal booster**

   a. certifies that the site of the proposed signal booster is located within the applicant's protected service area. [ ] Yes No

   b. has included with the application a written consent statement of the licensee of each MDS, ITFS and OFS station whose signal is to be retransmitted. [ ] Yes No

3. **Rule waivers and exceptions**: Is the proposal contained in this application inconsistent with any of the Commission's Rules? If "Yes", submit an exhibit describing all requests for waivers or exceptions, including justification and supporting documentation. [ ] Yes No

4. **Additional Exhibits.** Provide any other information in attached exhibits that may be required by the Commission's Rules, but is not addressed in this form.

Exhibit No.	Identity	Exhibit No.	Identity

Partial Dissenting Statement of Chairman Reed E. Hundt

Amendments of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding (MM Docket No. 94-131 and PP Docket No. 93-253)

For too many years, the MDS -- or wireless cable -- service has been plagued by backlogs, delays and outright fraud. One reason is sadly no secret. The Commission's policy of licensing MDS spectrum by lottery was an utter failure. As Congress explained when it granted the Commission auction authority, "[l]otteries engendered rampant speculation, undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license."[1] The lottery policy did as much to stymie competition in the cable market as to foster it, and it denied the public the revenues to which it is entitled for use of the spectrum.

The Report and Order we adopt today marks a significant break from that past. Taking advantage of the authority granted by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), the Report and Order announces that MDS spectrum will henceforth be distributed by auction.[2] That policy change and others described in the Report and Order replace the old lottery system with a market-based approach that encourages aggregation of

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[1]House Comm. on the Budget, Report to H.R. 2264, H.R. Rep. No. 111, 103d Cong., 1st Sess., p. 248 (1993) ("House Report").

[2]The Report and Order also uses "MDS" to include both Multichannel Multipoint Distribution Service (MMDS) stations as well as single-channel Multipoint Distribution Service stations, and I follow that lead in this statement.

channels by licensees who value them the most, who are most likely to construct wireless cable systems, and who are most likely to do so rapidly. The Commission has long held out the promise that wireless cable could emerge as an effective competitor in the video marketplace, leading to more consumer choice, better service and reduced prices. The portions of the order that set rules for new MDS applications will help keep that promise, and I am happy to vote to approve those new rules.

Regrettably, the Report and Order in one respect preserves the failed policy of the Commission's past. Although the Budget Act gives the Commission the authority to auction applications filed before July 26, 1993, a majority of the Commission has decided to resolve pending MDS applications by lottery. This will affect a minimum of 101 applications for five MDS license, and probably more. More than 4,000 applications for more than 350 MDS licenses filed before July 26, 1993, are still pending before the Commission, and there is no sure way to know how many of those licenses will now be distributed by lottery or simply handed out without a lottery if there are no mutually exclusive applications. And while the Commission has dismissed or returned roughly 3,000 applications pending before July 26, 1993, there is no way to know how many of those will be reinstated by the courts and then distributed for free. Because the giveaway the majority mandates cannot be reconciled with the public interest that the Communications Act requires our policies to serve, I dissent from that portion of the Report and Order.

Although this is only the second time I have dissented, in whole or in part, from a

Commission decision, it is not the first time I have dissented from a decision choosing lotteries over auctions. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253 (released July 14, 1994) (lotteries for unserved cellular areas) (Commissioners Ness and Chong not participating). I dissent again because the decision to use lotteries here is even less justifiable than in the context of unserved cellular areas. First, lotteries will result in significant windfalls to the successful applicants, who will receive licenses for sites that are 500 percent larger and far more valuable than the ones they applied for. The FCC is not supposed to be the Federal Christmas Present Commission -- particularly in June. Second, lotteries of licenses for small specific sites undermine the Commission's new and commendable policy of awarding authorizations for large geographical areas. That policy is designed to reduce roadblocks to the aggregation of MDS channels within boundaries that the market selects, so that wireless cable operators can put together truly competitive systems. The majority's decision means that fewer vacant channels will be available for those who win Basic Trading Area (BTA) authorizations at auction, and it may mean that BTA authorization holders' rights to vacant channels will be contingent on the Commission's resolution of applications still pending and on judicial review of those applications and those previously dismissed.

I dissent again on the issue of auctions vs. lotteries for another reason. While any single decision to use lotteries instead of auctions may seem in isolation not to be terribly costly, those decisions in the aggregate inflict serious harm on the public interest.

Today's decision is particularly disheartening in light of the eminently sensible alternative that is available. The Commission should recognize that pending MDS applications were filed to provide a service under rules that no longer exist and that the public interest is best served by applying the new MDS rules to pending applicants as well as new ones. The Commission should dismiss all pending applications, allowing applicants who desire to provide the new MDS service to participate in the auction for BTA authorizations.

* * * * *

It is not an oversimplification to say that the Commission's extensive experience with lotteries and its recent experience with auctions lead to two straightforward principles that should be the starting point for our thinking about all licensing decisions: Auctions are good. And lotteries are bad.

There is no longer any serious dispute that sound public policy requires auctioning spectrum licenses except where there are clear and compelling public interest reasons to the contrary. Auctions put licenses into the hands of those who value them most highly, and who are therefore most likely to provide service the public desires and to do so quickly and efficiently. Auctions also permit the U.S. Treasury to recover for the public a portion of the value of the public's spectrum.

Lotteries, meanwhile, do nothing to ensure that the licensee is the person or business

most likely to use the spectrum for the public good. They do nothing to ensure that the licensee will actually use the spectrum to provide any service, much less do so quickly. As Commissioner Ness points out, hundreds and hundreds of MDS licenses granted by lottery were eventually forfeited for failure to construct MDS stations. Under a lottery system, it is only by freakish accident that a spectrum license lands in the hands of those who will use it most productively.

Lotteries not only fail to further the public interest, they actually harm it. As the North American Securities Administrators Association and the Council of Better Business Bureaus have concluded, "[w]hen the federal government holds a lottery, con artists are among those who profit the most."[3] Nothing proves that more than the Commission's unhappy experience with MDS lotteries. As numerous newspaper articles and federal and state investigations have demonstrated, the Commission's wireless cable lotteries have done "more to enrich con artists than to grant ordinary citizens entree into the cable business." A. Crenshaw, "No Jackpot in This Lottery," Washington Post, Apr. 19, 1992.

The mechanism for the con is the "application mill." The Commission's MDS lotteries have led to an "explosion in abusive application mills that seek to reel in unwary small investors with the lure of the latest in high tech and the promises of quick riches." Investor Alert, p. 1. This is not to say that there are no legitimate applications that arrive

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[3]North American Securities Administrators Association and the Council of Better Business Bureaus, Investor Alert, p. 1 (April 1992).

through application mills. But there is no doubting that application mills have left many victims in their wake. Victims of application-mill scams include not only unlucky investors but the public as well. The public is harmed both because it is denied fair compensation for use of the public spectrum, and also because applications from application mills, even when granted, too often do not result in the construction of wireless cable facilities. The public is thus denied access to a competitor to wired cable and to the improved service and lower prices we can expect to accompany such competition.

Unfortunately, this discussion of application mills is highly relevant to the question before the Commission. Of the roughly 100 mutually exclusive applications for five sites that the Commission today commits to resolving by lottery, virtually all come through application mills with which the Mass Media Bureau is all too familiar. A single mill, Applied Telemedia Engineering and Management, Inc., is associated with 83 of the applications. That company was the target of a Federal Trade Commission investigation that resulted in the settlement of a federal-court complaint alleging deceptive conduct in connection with MDS applications. While the company denied wrongdoing, it nonetheless agreed, among other things, to the issuance of an injunction requiring that it pay $100,000 to the FTC for consumer redress and that it refrain from deceptive activities.[4] Each of the 83

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[4] Federal Trade Commission v. Applied Telemedia Engineering and Management, Inc., Final Judgment and Order for Permanent Injunction and for Settlement of Claims for Monetary Relief as to Defendants Applied Telemedia Engineering and Management, Inc., and Gerald Seifer, No. 91-0635-CIV-UNGARO-BENAGES (S.D. Fl., Jan. 12, 1993). See also M. Carnevale, "Miami Firm Faces Lawsuit by the FTC Over TV Licenses; Company Misled Consumers About 'Wireless Cable' Operations, Agency says," The Wall Street Journal, B7, April 2, 1991.

pending MDS applications involving Applied Telemedia was filed before entry of that federal injunction, and most were filed before the FTC action was initiated.

In view of those facts, it strikes me as impossible to reconcile the majority's decision to award pending applications by random selection with one of Congress's main reasons for granting the Commission auction authority in the first place: deep dissatisfaction with lotteries. "[L]otteries have been characterized by 'get rich quick' appeals by firms that would submit an application for a fee, so-called 'licensing mills,' and by licenses landing in the hands of those ill equipped to build or operate a service properly utilizing radio spectrum." House Report, p. 248.

The majority offers equitable considerations and administrative costs as its reasons for choosing lotteries over auctions. Those were the arguments offered in the context of pending applications for unserved cellular areas. They were unpersuasive then. They are even less persuasive now.

With respect to equitable considerations, the majority ignores the critical fact: that what pending applicants applied for no longer exists. The Commission today significantly expands the protected service area for "incumbent" MDS licensees, which includes the pending applicants who have yet to be awarded licenses. Pending MDS applicants sought licenses to provide wireless cable service throughout a 710 square mile area. Lottery winners will receive far more valuable licenses to provide wireless cable service throughout a

3848 square mile area, an area five times as large.

This extraordinary windfall is entirely undeserved. It is highly unlikely that many pending applicants for lotteries invested a significant amount of time or money in developing detailed business plans. Why should they when their chances of obtaining a license were those associated with a lottery? And, at least as a general rule, bona fide businesses forced to apply for a lottery would prefer an auction even now, because competitive bidding is far more likely than random selection actually to reward investment and innovation. While it is true that application mill applicants may have been convinced to "invest" unfortunate sums of money in a chance to win a lottery, that is hardly the kind of investment that sound public policy should reward. The majority tries to make much of the long (and certainly regrettable) delays experienced by many applicants, but I simply do not see how that justifies the windfall the majority awards them, any more than the $155 application fee entitles them to the significant benefit they will receive (the majority, of course, noting that the $155 bet can be refunded, if necessary). These pending applicants never had a reasonable expectation that they would actually win a lottery and receive a license. And given clear Commission policy and judicial precedent, see infra, at 14-15, the applicants were on notice that the Commission might ultimately decline to award the licenses for which they applied, or award the licenses in a different way.

A serious analysis of the equities would have to consider not only the equitable claims of pending applicants, but the equitable claims of others. The majority never considers,

however, whether its decision is fair to those who chose not to apply for a small service area but who would have applied for the larger and more valuable area that will now be given away; or whether its decision is fair to the American public as a whole, which will now be denied compensation for commercial use of the spectrum. Nor does the majority ask whether its decision is fair to residents of the affected areas, who are now less likely to receive the benefits of competition. If, as the majority suggests, delays are critical to an equitable analysis, surely the majority is obliged to consider the delay in rolling out wireless cable serve that a lottery will almost certainly cause.

The majority seeks to sidestep the likelihood of such a service delay by relying on a presumption that lottery winners will actually provide MDS service. See Report and Order, Par. 91 ("[T]here is no evidence before us that [application mill] applicants, if awarded an MDS station license by lottery, would not construct and operate an MDS station"). This presumption is contradicted by the Commission's experience with MDS lotteries, which, as I've mentioned, has resulted in the forfeiture of an embarassing percentage of MDS licenses for failure to provide service. And it is precluded by the congressional finding that lotteries place licenses "in the hands of those ill equipped to build or operate a service properly utilizing radio spectrum." House Report, p. 248. If the Commission is to rely on a presumption in this area, it should rely on a presumption that is the exact reverse of the one it has selected. Lotteries should be spurned absent, at least, clear evidence that lottery applicants will actually construct and operate MDS stations.

With respect to administrative costs, the only issue the majority raises is a trivial one: that an auction would require applicants to update their applications. That strikes me as a cost easily worth bearing given the benefits of competitive bidding. Moreover, the majority fails to say how it can justify not requiring pending applicants to update their applications given that the Commission will now be giving away licenses to provide wireless cable service over vastly expanded areas. Even under our old rules, MDS applicants were required to certify that they have the financial ability to construct wireless cable facilities and to provide wireless cable service for 12 months. 47 C.F.R. 21.17. It strikes me as arbitrary to assume that certifications provided in connection with a small wireless cable service area suffice to demonstrate the financial ability to construct and run a wireless cable operation that would cover an area five times as large. A logical application of our rules, and the only one consistent with a desire to ensure that new lottery winners will actually provide wireless cable service, would require pending applicants to recertify that they are financially qualified.

The majority asserts that its decision "serves the public interest," but its public interest inquiry consists entirely of its (incomplete) equity analysis and its (unconvincing) administrative argument. The Commission, it seems to me, is obliged to engage in a more extensive analysis of the public interest before choosing lotteries over auctions. While the Budget Act does give the Commission the discretion to reject auctions for applications pending before July 26, 1993, proper exercise of that discretion requires considering the public interest factors Congress deemed important enough to place in the Budget Act itself. The majority quite rightly observes that the Budget Act, on its face, does not compel the

Commission to review each of the listed public interest factors in deciding how to resolve pending applications, but nor does it compel consideration of equitable or administrative factors. And contrary to the majority's apparent view, the legislative history of the Budget Act contains no support for the notion that Congress intended the Commission to focus exclusively on equitable concerns and administrative costs. The legislative history of the Section 6002(e), the "Special Rule," reads in full:

> The Conference Agreement adopts the House approach and adds additional language which permits the Commission to use lotteries for applications that were accepted for filing before July 26, 1993. This provision will permit the Commission to conduct lotteries for the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses.[5]

If anything, this sparse legislative history -- which suggests only a congressional willingness to tolerate licenses for nine IVDS markets plus "several other licenses" -- precludes the majority's approach, under which lotteries would be used for a far greater number of licenses, in MDS and other services. It certainly does not support the majority's apparent view that it is inappropriate to consider factors other than the equities and administrative costs. The question, to paraphrase the majority, is not whether we are *required* to consider the statutory public interest factors, but whether we *should*. I think the answer is obvious. And I think that the decision to resolve pending MDS applications by lottery cannot be squared with those statutory factors.

First, the majority's decision to distribute pending MDS applications by lottery will

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[5]H.R. Rep. 103-213, 103d Cong., 1st Sess. 498-499 (1993) (Conf. Rep.).

not promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). We can confidently infer from experience that the lottery winner is unlikely on its own to construct an MDS facility within one year, as required, at which point the spectrum will return to the Commission and have to be redistributed. Second, the majority's decision to distribute pending MDS applications by lottery will not promote "economic opportunity and competition" and will not ensure that new and innovative technologies are readily accessible to the public by encouraging small businesses, rural telephone companies, and businesses owned by minorities and women to become licensees. 47 U.S.C. 309(j)(3)(B). Random distribution of licenses is the antithesis of a Commission policy to ensure the diversity of licensees, and a spectrum licensing method that we know from experience to be inconsistent with a rapid build out ensures neither economic opportunity nor the ready accessibility of new technologies.

Third, the majority's decision to distribute pending MDS applications by lottery obviously does not promote the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource." 47 U.S.C. 309(j)(3)(C). It is hard to predict the revenue that the U.S. Treasury will be denied as a result of the majority's decision, particularly when the universe of sites subject to lottery may expand if the Commission does not dismiss as-yet reviewed applications or if the court reinstates applications that have been dismissed. We can be certain, however, that a lottery

will generate no revenue at all, and that whatever amounts an auction would generate would be very warmly received by Congress and the Treasury.

Finally, the majority's decision to distribute pending MDS applications by lottery is utterly inconsistent with the Commission's obligation to promote "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(D). An auction winner would have an economic incentive to design and build its system to offer low-cost service to the public by, among other things, using spectrum-efficient technology that minimizes the need for future upgrades of its facilities to accommodate spectrum shortages. By contrast, a lottery winner, if it actually did build out its system, would be more likely to construct a system using relatively inexpensive, spectrum-inefficient technology, to allow for the sale of its license as soon as our rules permit.

Three alternatives to lotteries present themselves. The Commission could require pending applicants to bid for the specific sites for which they applied. While better than a lottery, that is ultimately an unsatisfactory alternative given the likelihood that pending lottery applicants -- the bulk of which, again, came through application mills -- are not prepared to construct MDS stations and provide wireless cable service. The Commission could reopen the filing window and then subject those specific sites to competitive bidding. But that would leave the Commission in the business of licensing small specific sites, when the rest of today's Report and Order rejects that approach in favor of one that primarily relies on authorizations to rationalize wireless cable service within a large geographical area.

The order quite persuasively explains the substantial public policy benefits of such an approach, with which, again, the majority's decision is inconsistent.

Plainly, the preferred alternative flows from recognizing that licensing additional MDS stations on a small site-specific basis, as proposed in the pending applications, would frustrate the important public policy goals that the Commission's new approach to MDS furthers. The new rules, which require (among other things) that applications may be filed and granted only on a BTA basis, should apply to all pending applications for new MDS stations. Because pending applications are not consistent with the new rules, they should be dismissed, with applicants who desire to reapply and participate in the BTA auctions free to do so. Such a dismissal would cover not only pending mutually exclusive applications for MDS licenses, which the majority would distribute by lottery, but also pending applications for which there is no competitor. A logical consequence of the majority's failure to dismiss pending applications is that applicants not facing mutual exclusivity would be entitled to receive MDS channels for free, no matter the public interest reasons for awarding those channels to the BTA authorization holder.

Although it states that there are "several potential drawbacks" to this approach, the majority mentions just one: that dismissal would lead to delays because there would be reconsideration proceedings at the Commission and legal challenges in court.[6] But there is

[6]In the same paragraph, the majority asserts that "while we are changing conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection to encourage aggregation

ample Commission precedent and clear legal authority for dismissing pending applications that are inconsistent with new Commission rules, as Commissioner Ness explains. See also See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). And the majority overlooks the risk of legal challenges associated with the course it has chosen. Many of the pending applications that Commission has dismissed are awaiting judicial review, and those that the Commission dismisses in the future will likely also end up in court. These cases could take a longer time to resolve than a challenge to a blanket dismissal order, if there was one, since they involve a variety of reasons for dismissal. If pending applicants eventually prevail in those lawsuits, the result could well be further litigation when those applicants claim a right to vacant channels for which BTA authorization holders thought they had paid.

Meanwhile, bidders and BTA authorization holders will have to contend with the uncertainty associated with dismissed pending applications awaiting judicial review. They will also have to deal with the burdens of negotiating with lottery winners -- the five sites we know about as well as those that we now do not, as well as those non-mutually exclusive applicants who will simply be given their licenses for free -- in order to accomplish the aggregation of wireless cable channels that the Commission, in the portions of the Report and Order that I join, says its new rules promote. Quoting Maxcell Telecom Plus, Inc. v. FCC,

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of available channels, we are not fundamentally changing the nature of the service." The facts in that sentence provide not a drawback to dismissing all pending applications, but the main reasons for doing so.

815 F.2d 1551, 1554 (D.C. Cir. 1987) -- a case in which the D.C. Circuit upheld a Commission decision to apply new rules to pending applicants -- the majority purports to "balance the 'ill effect' of the new [MDS] rule[s] on the pending applicants with the 'mischief of frustrating the interests the rule[s] promote.'" Report and Order, par. 95. Even if the Commission could properly ignore the equitable interests of those other than pending applicants, and even if the Commission could properly decline to bring the Budget Act's public interest factors to bear on its decision, I have no doubt that the "mischief" to the new MDS framework that will be caused by the majority's decision far outweighs the minimal "ill effects" of applying the new MDS rules to pending lottery applicants.

Separate Statement
of
Commissioner James H. Quello

June 15, 1995

Re: Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MM Docket No. 94-131) and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (PP Docket No. 93-253)

I would like to make a few brief comments today on the issue of auctions versus lotteries for pending applications. Before I do so, I want to congratulate Barbara Kreisman and her staff for their diligence and hard work in reducing the backlog of MDS applications. This Commission unanimously agrees that the three items today will go a long way toward making this service a reality, which will benefit the American public by bringing a wireless competitor to cable television.

Where we disagree is on the decision of how to treat pending applications during a time of transition from one licensing methodology, lotteries, to another, auctions. I will not belabor the relative problems or benefits of lotteries or auctions because this should not be a philosophical debate.

We have before us approximately 100 applications for five sites that were filed many years before this Commission received auction authority. Such auction authority, I might note, was received during my tenure as Chairman. We were specifically granted discretion at that time, however, to determine how to process what I will call "pre-filed and accepted" applications for various communications services. But for our own administrative inability to process thousands of MDS applications in a timely manner we would not be faced with the problem of what to do with these applications that have been languishing in regulatory "Limbo" for over four years.

The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and our rules at that time.

As this Commission has faced this issue in other services, such as Cellular Unserved for example, I have consistently maintained -- and will continue to conclude -- that unless directed otherwise by Congress, we should exercise the discretion we have been given to treat pending applicants fairly which means processing their applications under the rules extant at the time of filing. In this instance, this means that we should, as I believe the majority will decide, lottery the pending 100 applications for the five MDS sites and then proceed to auction new applications.

In summary, I believe that it would be inequitable and administratively burdensome to force applicants for MDS station licenses, who filed their applications many years ago in reliance upon the lottery rules then in effect, to participate in an MDS auction, which -- unlike a lottery that can be held almost immediately -- cannot be held until the end of this year, which would, yet again, delay service to the public.

Long before it became fashionable to talk about "serving our customers," I have endeavored to decide the matters before us by using common sense and fairness based on the facts. I do not believe it is our function to justify desired outcomes through legal technicalities. The fact that something is legally permissible does not make it right or fair.

I have uncharacteristically spoken at some length today because I want to convey my deep-seated conviction that pending applications should be treated fairly by processing them under the rules in effect at the time of filing.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Amendment of Parts 21 and 74 of the Commission's Rules With Regard To Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act-Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253.

By the Commission's actions today, we adopt rules to facilitate the continued deployment of Multipoint Distribution Services ("MDS"). In doing so, we process thousands of applications and initiate a competitive bidding process for the licensing of MDS. In order to process the remaining acceptable, mutually exclusive applications for MDS station licenses that were filed prior to July 26, 1993, when the Commission first received auction authority, the Commission has determined to employ a lottery rather than an auction procedure.

I support the use of a lottery for these pending mutually exclusive applications for several reasons. First and foremost, because I believe that there are compelling public interest justifications for doing so as I did when the Commission decided how to license the cellular unserved areas.[1] The pending applications in this proceeding were filed more than four years ago and the applicants relied in good faith on lottery procedures in existence at that time. Moreover, it is apparent that the delay in processing these applications was of no fault of these applicants. Therefore, it appears unreasonable to now subject their applications to a modified licensing procedure.

Second, some have argued that applicants who have filed by way of "application mills" are in large measure applicants that lack the wherewithal to build or operate the systems that are licensed to them. Moreover, some contend that these applicants tend to unnecessarily delay service to the public. Simply put, we cannot unequivocally determine that these MDS applicants have no intention of constructing the facilities in order to provide service to the public. Indeed, one could argue that the utilization of auctions does not necessarily guarantee service in

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[1] See, *Memorandum Opinion and Order*, Cellular Unserved Areas (License Selection Procedures), 9 FCC Rcd 7387, 7391 (1994). In this decision, we specifically held that to move from lotteries to auctions in the licensing of cellular facilities would be unfair to those applicants who relied in good faith upon existing lottery procedures.

a timely fashion. Finally, as a member of the "old regime," I am loathe to making the assumption that an applicant seeking a license under the lottery procedure is less likely to intend to construct facilities than an applicant seeking a license under the competitive bidding process.

In addition, some have argued that these applicants will receive an added benefit as a result of being granted a larger BTA. However, the modification we make today with respect to the protected service area will benefit current licensees who through the lottery process were granted a 15 mile protected service area. Moreover, I am not convinced that our decision today will interrupt the aggregation of licenses as some have alleged. That aggregation is already occurring, and I believe, will continue to occur and will not necessarily cease because licenses for these few locations will be subject to the lottery process.

While this action may delay the commencement of the auctions, for which authority was obtained under Commissioner Quello's leadership, I believe that the Commission is doing the right thing by using a lottery procedure to process the remaining previously filed MDS applications. In my estimation, to do otherwise would not only contradict precedent, ignore the principle of fairness as well.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

DISSENTING IN PART

Re: *Licensing and Service Rules and Competitive Bidding Procedures for Multipoint Distribution Service*

I fully support the new rules for MDS[1] licensing that we adopt today. I am confident that the licensing of MDS on a regional basis through competitive bidding will enhance existing wireless cable systems and bring about the construction of new systems in unserved areas. However, I dissent from that portion of the decision concerning our treatment of pending applications.

I believe that the public interest would have been better served by applying our new rules to the pending MDS lottery applications, resulting in their dismissal, and permitting those applicants who choose to do so to bid in future MDS auctions.

I do not favor using auctions at all costs. There may be some situations where, in light of all the factors, lotteries would be in the public interest. This is not such a case.

I do not believe that the approach adopted today by the majority -- to permit pending applications to be awarded under the old lottery rules, but to enable them to benefit from the expanded protected service areas of the new rules -- serves the public interest. It does not comply with Congressional intent or Commission policy to reward speculation in this manner. It will delay, rather than enhance, the construction and growth of wireless cable services.

I would prefer that the pending MDS applicants be subject to the competitive bidding procedures adopted today for new MDS applicants. Congress gave the FCC the authority to auction licenses, rather than award them by lottery, where mutually exclusive applications have been filed. Congress concluded that auctions, rather than lotteries, would better ensure that spectrum licenses will be awarded to those who most value them.

The Omnibus Budget Reconciliation Act of 1993 ("OBRA") gives the Commission discretion to use either competitive bidding or lotteries for applications accepted for filing prior to July

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[1] "MDS" as used herein refers to both single channel Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS).

26, 1993. The MDS pending applications present us with the opportunity to exercise that discretion and to determine which approach best serves the public interest.

There are over 4,000 MDS applications pending at the FCC which were submitted before July 26, 1993. A small fraction of these applications have been accepted for filing. These applications were submitted under our old, pre-OBRA rules that authorized lotteries for specific geographic sites.

The beneficial effects of using auctions are perhaps most evident in services where speculation has been rampant. MDS has just such a history. Over the last 27 months, over 1100 MDS authorizations have been cancelled or forfeited for failure to construct. Why? Because lotteries attract speculators -- individuals who have no relevant experience and no serious intention to construct and operate a wireless cable system.

The high level of speculation has meant delay in our efforts to foster the effective delivery of wireless cable service. Incumbent MDS operators have been unable to aggregate additional channels. Potential new entrants have been smothered by the backlog of pending applications.

In February 1993, the Commission took measures to stem the increasing speculation in MDS and to prevent rewarding speculators who had already applied. One measure adopted was a prohibition on partial and full settlement agreements among MDS applicants. The Commission found that few MDS applicants entering settlement agreements had any serious intention to construct; rather, most of them wished to have their applications granted solely for the purpose of later selling their authorizations to wireless cable operators in need of spectrum.[2] In an attempt to ensure that "speculative applicants are not rewarded," the Commission applied the new prohibition on settlement agreements to both future and pending applications.[3]

The new rules we adopt today authorizing the use of competitive bidding to award MDS authorizations will finally eliminate the problems of speculation that have plagued MDS and will ensure that licenses in the future will go to those parties who value them the most.

I recognize that lotteries could be held relatively soon for the five sites where, once our processing is complete, the Mass Media Bureau predicts there will be approximately 100 acceptable mutually exclusive pending applications. But the small number of applications at

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[2]Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Bands, 8 FCC Rcd. 1444, 1447 (1993)(Report & Order).

[3]Id.

issue does not relieve us of the obligation to make a policy decision that carefully weighs all of the relevant factors.

The evidence is overwhelming that few, if any, of these applicants have a bona fide intention to construct and operate an MDS system. Indeed, the practical result of a lottery in this instance is very likely to be the precise result Congress sought to eliminate when it gave the FCC auction authority. Even in the improbable event that a bona fide applicant wins a lottery, the result will be one more site-specific license encumbering the BTA, further frustrating the new method of licensing that we today embrace as the best approach for the future.

The bona fide MDS applicants among these pending applications that the majority seeks to protect, if they exist, may or may not succeed in an auction. However, an auction at least ensures that they will compete for a license with parties who are equally serious in their commitment to build a wireless cable system, rather than with speculators lacking any intent to construct.

Moreover, the majority has failed to consider the resources required for the further processing of the pending applications required by continuing with lotteries. The public would benefit from the reduction of the administrative burden on the agency by the dismissal of over 4,000 pending applications, the majority of which will be, or have already been, dismissed for technical deficiencies. The blanket dismissal would also render moot the pending court appeals of previously dismissed applications from this group.

The new BTA service areas and technical and operational rules we adopt today represent a very significant change in our licensing of MDS. I am persuaded that, under these changed circumstances, applying our new rules to the pending applications would conform with Commission precedent. The Commission's authority to apply new rules to pending applications is not new and in fact has been invoked previously in MDS. In 1993, when the Commission adopted the prohibition on settlements among MDS applicants described above, the Commission specifically addressed the issue of applying the new rule to pending applications and its authority to do so. The Commission concluded at that time that "[i]t is well-settled that the rules applicable to previously-filed applications may be amended."[4] Indeed, the new rules to expand the protected service areas of incumbents that we adopt today will be applied to pending MDS applications as well.

The Commission has applied new rules to pending applications in other cases. See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of

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[4]Report & Order, 8 FCC Rcd. at 1447, citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

Comparative Hearings, 98 F.C.C.2d 175 (1984), recon., 101 F.C.C.2d 577 (1985); Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, 7 FCC Rcd. 1625, 1628 n. 22 (1992)("the Commission by rule making may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest"); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 7 FCC Rcd. 4484, 4489 n. 66 (1992).

In this instance, application of our new rules for competitive bidding to pending lottery applications would necessarily result in the dismissal of those applications. The Commission has previously dismissed pending applications, without prejudice to the applicants' right to re-file, as a result of a change in rules. See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983)(citing the administrative burdens involved in resolving the changes needed as a result of rule changes, the Commission dismissed 1,400 pending applications and opened a new filing window for applicants to apply under the new rules), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). All interested pending MDS applicants, once dismissed, would similarly be able to participate in the auctions for MDS authorizations for any BTA under our new rules.

For all these reasons, I believe that the public would be better served if the Commission had chosen to employ competitive bidding procedures for all MDS authorizations and dismissed the pending MDS lottery applications, rather than proceeding with lotteries.

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